(32,638)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 226

ROSARIO GAMBINO AND JOSEPH LIMA, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Record from the district court of the United States, northern New York	1	1
Petition for writ of error and bail	1	1
Assignments of error	2	1
Order allowing writ of error and bail	13	9
Citation (omitted in printing)	14	
Notice of filing of praecipe	16	10
Writ of error	17	10
Notice of presentation of bill of exceptions	18	11
Indictment	19	12
Bill of exceptions and order settling same	23	14
Order extending time	83	56
Stipulation re extension of time	85	57
Order extending time	86	58
Stipulation re extension of time	87	58
Order extending time	88	59
Stipulation re transcript of record	90	60
Clerk's certificate (omitted in printing)	90	
Proceedings in United States circuit court of appeals, second circuit	91	60
Opinion per curiam	91	60
Decree	92	61
Clerk's certificate (omitted in printing)	94	
Order allowing certiorari	95	61

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 16, 1927

[fols. a & 1]

IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF NEW YORK

No. —

UNITED STATES OF AMERICA, Complainant,

against

ROSARIO GAMBINO and JOSEPH LIMA, Defendants

PETITION FOR WRIT OF ERROR, SUPERSEDEAS, AND BAIL

To the Honorable Frank Cooper, Judge of the District Court of the United States for the Northern District of New York:

And now come Rosario Gambino and Joseph Lima, the Defendants in the above entitled cause, and feeling themselves aggrieved by the verdict of the jury and the judgment of the District Court of the United States, for the Northern District of New York, entered on the 27th day of May, 1925, hereby petition for an Order allowing them, said Defendants, to prosecute a Writ of Error from the United States Circuit Court of Appeals of the Second Circuit to the District Court of the United States, for the Northern Dis-[fol. 2] trict of New York; that said Writ of Error may be made a Supersedeas, and that your Petitioners be released on bail in an amount to be fixed by the Judge thereof, pending the final disposition of said Writ of Error. Assignment of Errors is filed with this petition.

Dated May 27th, 1925.

Rosario Gambino, Joseph Lima, by I. K. Baxter, Their Attorney.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR

And now, on this 15th day of August, 1925, come the Defendants, Rosario Gambino and Joseph Lima, by their At-

torney, I. K. Baxter, and say that the Judgment of conviction entered against them in the above case on the 27th day of May, 1925, is erroneous and unjust to the defendants, because—

[fol. 3] First

The Court erred in denying the preliminary motions of the Defendants to restrain the use of evidence obtained through the false arrest and the illegal search and seizure of Defendants and their property, by New York State Policemen J. T. Carroll and R. M. Travis, on the first day of August, 1924; and for the return to the defendants of the property seized from them as aforesaid; because said arrest, search and seizure were made without any warrant or authority in law, and in violation of their Constitutional rights to be immune from unreasonable searches and seizures to not be compelled to give evidence against themselves and to not be deprived of their liberty or property without due process of law.

Second

The Court erred in admitting over objections and exceptions of Defendants, at the time of the trial, evidence of said State Policemen J. T. Carroll and R. M. Travis, on May 15, 18 and 25, 1925; because said evidence had been obtained by means of the false arrest of and the unlawful search and seizure of Defendants and their property, in violation of their constitutional rights, as aforesaid.

Third

The Court erred in admitting over objections and exceptions of defendants at the time of trial, evidence by J. T. Carroll, that "the rear end of Defendants' automobile hung [fol. 4] pretty low;" and in response to the question: "What did that indicate to your mind?" the answer: "There was a load of *booze*;" because the question called for a mental operation or conclusion of the witness, and the answer given was merely such opinion or conclusion, not a fact within his knowledge and the witness was not shown qualified to answer.

Fourth

The Court erred in admitting over objections and exceptions of defendants, at the time of the trial, evidence by J. T. Carroll, that Mr. Frank Rayno "has a reputation of being a big bootlegger;" because the reputation of Frank Rayno, a stranger, was incompetent, irrelevant and immaterial to the issues in the case, and the evidence was improperly suggestive and prejudicial as against the Defendants to the Jury.

Fifth

The Court erred in admitting over objections and exceptions of defendants, at the time of the trial, testimony by Trooper Carroll that: "After finding beer in the car, or what we took to be the beer in the car, at that time I went downstairs and asked what they had on, and I went in the direction of Lima and he said 'I have a gun.' He took a .25 Colt automatic out of his vest pocket and gave it to me;" because the answer was not responsive to the question asked, viz: "What conversation, if any, did you have with either of these defendants at the police station there on [fol. 5] that occasion?" Said answer contained statements of opinion or conclusion by the witness, without foundation, which were incompetent as evidence, and highly prejudicial and improper for the Jury to receive as evidence.

Sixth

The Court erred in admitting over objections and exceptions of defendants, at the time of trial, testimony by Carroll and Travis that they had seized a revolver, a pistol and cartridges from the defendants, and in admitting such property in evidence; because it had been shown that said property was lawfully in possession of the defendants under proper permits of a Court of Record; and because such evidence was irrelevant, incompetent and immaterial, improperly suggestive and highly prejudicial to the jury, as against the defendants.

Seventh

The Court erred in admitting in evidence over objections and exceptions of the defendants at the time of trial cer-

tain bottles and labels and alleged beer as Government Exhibits Nos. 5, 6 and 7, because the same were irrelevant, incompetent and immaterial, were not properly proven, were improperly suggestive to the jury and prejudicial to defendants.

Eighth

The Court erred in admitting over objections and ex- [fol. 6] ceptions of the defendants, at the time of trial, evidence by Government Chemist Rubin as to the alcoholic contents of Government Exhibits Nos. 5, 6 and 7, because the same were irrelevant, incompetent and immaterial, no proper foundation for such evidence having been laid.

Ninth

The Court erred in sustaining Government's objection to the following question on Cross-examination of State Policeman Carroll: "At the time you told these Gentlemen of the Jury that you had in good faith stated all you remembered finding, you knew at that time that you found also and had delivered to you in your possession valid permits from a Court of Record, authorizing these men to carry revolvers, is not that true"? because Counsel for Defense showed the Court by the record that the witness had previously testified that he had in good faith stated all he remembered finding and had not stated that he found said permits, although later he admitted receiving said permits from defendants. The question bore directly on the good faith and credibility of the witness and was asked upon Cross-examination.

Tenth

The Court erred in refusing to permit Defendants on Cross-examination to question witness Carroll as to the contents of an affidavit made by witness in the case at bar on the 14th day of May, 1925, and in refusing the offer of said affidavit in evidence for the purpose of contradicting [fol. 7] other testimony by witness and as bearing upon the credibility of the witness; because it was a proper subject for Cross-examination, the said affidavit having been presented to the Court by the prosecution on the preliminary motions.

Eleventh

The Court erred in admitting over objections and exceptions of defendants, at the time of the trial, evidence by witness Steenbaerge that Government Exhibits Nos. 5 and 6 were kept by witness from the time they were turned over to him by Mr. Robillard, until he took the contents from one of the bottles and put it into another bottle and sent it to the chemist for analysis; because said testimony was given in response to leading questions in the following form, viz:

"Q. After Exhibit No. 5, Government's Exhibit No. 5, for identification and Government's Exhibit No. 6 for identification, were turned over to you by Mr. Robillard, did you keep them in your possession?"

A. "I did."

Q. "Until you took the contents from one of the bottles and put it into the other bottle you sent to the Chemist for analysis?"

A. "I did, yes, sir";

and said questions were improper in form, called for a conclusion and were leading.

Twelfth

The Court erred in admitting over objections and exceptions of Defendants, at the time of the trial, evidence by Witness Steenbaerge, that Government Exhibits Nos. [fol. 8] 5 and 6 were in the same condition at the time that they were turned over to the Government Chemist as at the time witness had received them; because said evidence was given in response to a leading question in the following form:

Q. "And it was in the same condition until the cap was taken off the bottle, and some of the contents poured into Government's Exhibit No. 7?"

A. "It was."

Because the question was leading, called for a conclusion or opinion of the witness, no foundation laid for same, and witness not shown qualified to answer.

Thirteenth

The Court erred in admitting over objections and exceptions of Defendants, at the time of the trial evidence by Witness Steenbaerge, that Government's Exhibit No. 6 was in the same condition when he turned it over to the chemist on May 18th, 1925, as it was when he received it from Mr. Robillard on August 2nd, 1924; because of said evidence was an opinion or conclusion on the part of the witness, without foundation, and was given in response to a leading question in the following form:

Q. "Well, whether or not it was in the same condition when you turned it over to Mr. Rubin, the chemist, last Tuesday, as you have stated, as it was when you received it from Mr. Robillard on August 2nd, 1924, as you have heretofore testified, with the exception of the typewritten label, which appears on the exhibit?"

A. "It is";

and because witness admitted on cross-examination that he did not know anything about the contents of the bottle.

[fol. 9] Fourteenth

The Court erred in denying the motion of the Defendants after all the evidence in the case was in, to direct a verdict of not guilty on count one of the Indictment, conspiracy, as to each of the Defendants upon the grounds that there was not any evidence or not sufficient evidence to warrant the jury in finding a verdict of guilty on said count, against either of said Defendants; that all of the evidence had been illegally obtained by means of the false arrest and the unwarranted and unlawful search and seizure of Defendants' property, in violation of their Constitutional rights, as guaranteed by the Fourth, Fifth and Sixth Amendments to the Constitution of the United States; to which ruling of the Court the defendants by their counsel duly excepted.

Fifteenth

The Court erred in denying the motion of the Defendants, after all the evidence in the case was in, to direct a verdict of not guilty on Count three of the Indictment, possession, as to each of the Defendants upon the grounds that there

was not any evidence or not sufficient evidence to warrant the jury in finding a verdict of guilty on said count, against either of said defendants; that all of the evidence had been illegally obtained by means of the false arrest and the unwarranted and unlawful search and seizure of Defendants' property, in violation of their constitutional rights as guaranteed by the Fourth, Fifth Amendments to the Constitu-[fol. 10] tion of the United States; and that the law under which this count was found was unconstitutional, because neither the Eighteenth Amendment nor any other part of the Constitution of the United States authorized to Congress nor delegated to the United States the power to pass such a law, nor did the constitution prohibit to the States the power to pass such a law; therefore such power is reserved under the Tenth Amendment to the Constitution of the United States to the States respectively, or to the People; to which ruling of the Court, the Defendants, by their counsel, then and there duly excepted.

Sixteenth

The Court erred in denying the motion of the Defendants after all the evidence in the case was in, to direct a verdict of not guilty on Count four of the Indictment, transportation, as to each of the defendants, upon the grounds that there was not any evidence or not sufficient evidence to warrant the jury in finding a verdict of guilty on said count, against either of said defendants; that all of the evidence had been illegally obtained by means of the false arrest and the unwarranted and unlawful search and seizure of Defendants' property, in violation of their Constitutional rights as guaranteed by the Fourth, Fifth and Sixth Amendments to the Constitution of the United States; to which ruling of the Court, the Defendants, by their counsel, duly excepted.

Seventeenth

The Court erred in not directing the jury to find the De-[fol. 11] fendants not guilty at the close of the whole case.

Eighteenth

The Court erred in charging the jury as follows: "If you are satisfied beyond a reasonable doubt that there was

an agreement and that these men were there by this agreement and that they were doing something in carrying out that agreement, why, then, you may find them guilty of conspiracy." To which charge of the Court the Defendants, by their counsel, duly excepted.

Nineteenth

The Court ered in charging the Jury as follows: "If that be so, then, as far as the Defendant Lima is concerned, he is not guilty of conspiracy, he is not guilty of any other offense, if he was in entire innocence of the fact that there was anything unlawful in that car or that any crime was being committed, or that any conspiracy had been made."

To which charge of the Court, the Defendants, by their counsel, duly excepted.

Twentieth

The Court erred in charging the Jury as follows: "So, if you are satisfied beyond a reasonable doubt that there were intoxicating liquors in that car and Gambino and Lima knew they were in the car, then they are guilty of possession. If only one knew it why, then that one who knew [fol. 12] it is guilty of possession. If neither of them knew it and the- were both innocent of any knowledge of the contents of the car, then neither of them is guilty." To which charge of the Court, the Defendants, by their counsel, duly excepted.

Twenty-first

The Court erred in charging the Jury as follows: "If the Jury are satisfied by evidence which convinces them beyond a reasonable doubt that these two defendants or either of them had in their possession intoxicating liquor, and knew that it was intoxicating liquor, that warrants a verdict of guilty." To which charge of the Court, the Defendants, by their counsel, duly excepted.

Twenty-second

The Court erred in denying the Defendants' motion to set aside the verdict of the Jury on the ground that it was not

supported by any competent evidence in the record. To which charge of the Court, the Defendants, by their counsel, duly excepted.

Twenty-third

The Judgment of the Court is contrary to law, as shown in the foregoing Assignment of Errors.

Wherefore, said Defendants and plaintiffs in error pray that the said Judgment of the District Court of the United States may be reversed and held for naught; and that the [fol. 13] property illegally seized from the Defendants may be ordered returned to them.

I. K. Baxter, Attorney for Petitioners.

In United States District Court

[Title omitted]

Order Allowing Writ of Error and Bail.—May 27, 1925

Let a Writ of Error issue from the United States Circuit Court of Appeals for the Second Circuit to the United [fol. 14] States District Court for the Northern District of New York, as prayed for in the petition of the said Rosario Gambino and Joseph Lima; and that a citation be issued to the Defendants in error.

And, it now appearing that a citation has been served in the cause, it is now ordered That the Writ of Error, allowed us above stated, operate as a Supersedeas, and the Defendants be admitted to bail, upon furnishing a bond in the penal sum of Five Thousand Dollars each conditioned according to law to be approved by me.

Frank Cooper, Judge.

[fol. 15] Citation, in usual form, omitted in printing.

[fol. 16] In United States Circuit Court of Appeals, Second Circuit

No. —

Rosario Gambino and Joseph Lima, Plaintiffs-in-error,

against

United States of America, Defendants-in-error

Notice of Filing of Precipe

To the Hon. Oliver D. Burden, attorney for defendants-in-error:

Sir: Please take notice that on the 18th day of August, 1925, the undersigned filed with the clerk of this Court a præcipe for the record to be transmitted to the United States Circuit Court of Appeals, Second Circuit, on the Writ of Error used out in the above cause, and notice of which præcipe is herewith served on you.

Irving K. Baxter, Attorney for Plaintiff-in-error.

Office and P. O. Address: 66 Genesee Street, Utica, New York.

[fol. 17] In United States District Court

Writ of Error

The President of the United States to the Honorable Judge of the District Court of the United States for the Northern District of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the Judgment, of a cause which is in the said District Court before you between the United States of America, Plaintiff, and Rosario Gambino and Joseph Lima, Defendants, manifest error has happened to the great damage of the said Defendants, Rosario Gambino and Joseph Lima, as by their complaint appears, we, being willing that error, if any, should be duly corrected, and full, speedy justice — to the parties aforesaid in their behalf, do command, if judgment be given thereunder, that then under

your seal, distinctly and openly, you send the record and proceedings aforesaid, with the things concerning the same, to the United States Circuit Court of Appeals for the Second Circuit, together with this Writ, so that you have the same in the Postoffice Building, in the Borough of Manhattan, in the City of New York, in said Circuit, on the 17th day of September, 1925, in the said Circuit Court of [fol. 18] Appeals, to be then and there held; that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done thereunder to correct that error, what of right, according to the laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, this 20th day of August, 1925, in the 149th year of the Independence of the United States of America.

R. A. Higgison, Clerk, by Nellie J. Marks, Deputy.

In United States Circuit Court of Appeals, Second Circuit

[Title omitted]

Notice of Presentation of Bill of Exceptions

Sir: You will please take notice that the annexed Bill of Exceptions herein will be presented to the Honorable [fol. 19] Frank Cooper, United States District Court Judge, in and for the Northern District of New York, at his chambers in the Federal Post Office Building, at Albany, N. Y., on the 26th day of February, 1925, at 10 o'clock in the forenoon of that day, or — soon thereafter as counsel can be heard, for settlement and allowance as a part of the record in the above entitled cause, upon the Writ of Error sued out herein by the Plaintiffs-in-Error.

Dated February 26th, 1925.

Irving K. Baxter, Attorney for Plaintiffs-in-error.

Office and P. O. Address: 60 Genesee St., Utica, N. Y.

IN UNITED STATES DISTRICT COURT

INDICTMENT

The Grand Jurors of the United States of America, duly empanelled, sworn and charged to inquire in and for [fol. 20] the said Northern District of New York, upon their oaths and affirmations, do indict and present that Rosario Gambino and Joseph Lima, hereinafter called Defendants, in the months of July and August, 1924, in the County of St. Lawrence, State and Northern District of New York, and within the jurisdiction of this Court, wilfully, wrongfully and feloniously conspired, confederated and agreed together and with others, whose names are to your Grand Jurors unknown, that they would commit an offense against the United States by wilfully and unlawfully violating the National Prohibition Act and the Customs Laws of the United States by wilfully and unlawfully importing and bringing into the United States and transporting through the State and Northern District of New York, after such importation, large quantities of intoxicating liquors, which were forbidden to be brought into the United States, possessed or transported therein, such liquors being fit for beverage purposes and containing more than one-half of one per cent of alcohol.

That after the formation of such conspiracy and in furtherance thereof the Overt Acts for the purpose of effecting the object of such conspiracy and during the continuance thereof, were as follows:

That the said Defendants, in a Buick Roadster, belonging to Defendant Gambino, went to Canada across the International Boundary Line, and obtained a load of Canadian Ale, same being intoxicating liquor, containing more [fol. 21] than one-half of one percent of alcohol by volume and fit for beverages purposes, and imported said ale across the International Boundary Line into the States and Northern District of New York and within the jurisdiction of this Court, or obtained same at a place near the International Boundary Line in the District and State aforesaid, and transported same South to Massena, where they were apprehended, such importation, possession and transportation through the State and Northern District of New York, of such intoxicating beverages forbidden to be brought

into the United States, possessed and transported therein, being in violation of the National Prohibition Act and all of the aforesaid being in violation of the provisions of Section 37 of the Criminal Code of the United States and against the peace and dignity of the United States of America.

Count Two

And your Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further present and indict that Rosario Gambino and Joseph Lima, hereinafter called defendants, in the months of July and August, 1924, in the County of St. Lawrence, State and Northern District of New York, and within the jurisdiction of this court, wrongfully, fraudulently and unlawfully imported and brought into the United States from the Dominion of Canada certain large quantities of intoxicating liquors fit for beverage purposes, containing more than one-half of one per [fol. 22] cent of alcohol by volume, contrary to the form of the Statute in such case made and provided and particularly Section 3, Title 2, of the National Prohibition Act and against the peace and dignity of the United States of America.

Count Three

And your Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further present and indict that in the month of July and August, 1924, in the County of St. Lawrence, State and Northern District of New York and within the jurisdiction of this Court, Rosario Gambino and Joseph Lima, hereinafter called defendants, wrongfully, fraudulently and unlawfully possessed certain large quantities of intoxicating liquor, fit for beverage purposes, containing more than one half of one per cent of alcohol by volume, contrary to the form of the statute in such case made and provided and particularly Section 3, Title 2, of the National Prohibition Act, and against the peace and dignity of the United States of America.

Count Four

And your Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further present and indict that

in the months of July and August, 1924, in the County of St. Lawrence, State and Northern District of New York and within the jurisdiction of this Court Rosario Gambino and Joseph Lima, hereinafter called defendants, wrong-[fol. 23] fully, fraudulently and unlawfully transported certain large quantities of intoxicating liquors, fit for beverage purposes, containing more than one-half of one per cent of alcohol by volume, contrary to the form of the statute in such case made and provided and particularly Section 3, Title 2, of the National Prohibition Act, and against the peace and dignity of the United States of America.

R. Dey, Foreman of the Grand Jury. Oliver D. Burden, U. S. Attorney in and for the Northern District of New York.

In United States District Court

[Title omitted]

Bill of Exceptions and Order Settling Same

Be it remembered that the preliminary motions of the defendants in the above entitled cause came on for hearing and decision on the 27th day of October, 1924, being one of the days of the October term of said court, before the Hon-[fol. 24] orable Frank Cooper, one of the Judges of said court.

Leo Breed, Esq., appeared as counsel for the Government.

S. J. Capeceiatro, Esq., appeared as counsel for the defendants.

Defendants moved to restrain the use of evidence unlawfully obtained by J. T. Carroll and R. M. Travis, New York State policemen, through the alleged false arrests of the defendants and the alleged illegal search and seizure of defendants' property on the 1st day of August, 1924, near Massena, N. Y., and for an order directing the return to the defendants of the property unlawfully seized from them, as aforesaid; and offered in support of said motions, the verified petition of the defendants alleging that on the 1st

day of August, 1924, while petitioners were lawfully upon the State highway at or near Massena, N. Y., in defendant Gambino's Buick roadster, they were falsely arrested by State Troopers Carroll and Travis, and their property and persons searched and seized, without any warrant or authority in law, and in violation of their constitutional rights to be secure from unreasonable searches and seizures, and to not be deprived of their property or liberty without due process of law, as guaranteed by the Fourth, Fifth and Sixth Amendments to the Constitution of the United States. That the seized property and persons of the defendants were turned over by the said State officers to Federal of- [fol. 25] ficials for prosecution in the United States District Court for alleged illegal possession and transportation of intoxicating liquor, to wit: beer. That said Federal officers were proposing to use evidence obtained by means of the said false arrest and illegal search and seizure by said State troopers against these defendants, at their proposed trial in said United States District Court on said charges and in proceedings to have defendants' said property confiscated. That defendants also presented in support of the motion, at said time, affidavits by N. E. Santamour and George Aubrey, wherein it was shown that the defendants stopped in front of the Reno Garage, of which Santamour was the proprietor, and said Aubrey was an employee, on the first day of August, 1924. That defendants, at about one o'clock in the afternoon of said day, stopped in front of said garage in their Buick automobile. That immediately thereafter, State Troopers Carroll and Travis also stopped in front of said garage in a Ford car and demanded of defendants to open the rear compartment of their car. That defendants refused to do so, whereupon said State troopers asked said Santamour for keys to open said rear compartment. That said Santamour informed said State troopers that they did not have any keys which could open said compartment. That said State troopers then questioned defendants as to what was in the rear compartment of their car. That both defendants informed the State troopers that they did not know what was in said compartment. That thereupon and without further ado, said State troopers arrested the defend- [fol. 26] ants and ordered them to proceed in their custody

to Massena, New York. That said Santamour and Aubrey made an outward examination of said Buick car, and that no liquor or intoxicating beverage of any kind and no merchandise, freight or packages whatsoever appeared to be in said car, and that said Santamour asked said State troopers whether they had a search warrant and was informed that they did not have any.

The cause came on for trial on the 15th day of May, 1925, being one of the days of the May term of said court, before Honorable Frank Cooper, one of the Judges of said court.

Leo Breed, Esq., appeared as counsel for the Government.

Irving K. Baxter, Esq., appeared as counsel for the defendants.

The defendants again moved to restrain the use of evidence unlawfully obtained as aforesaid, and for the return of property unlawfully seized, as aforesaid, upon all the grounds and upon all the papers theretofore offered in support of said motions. A copy of an answering affidavit of J. T. Carroll was then served upon counsel for the defendants, by Leo Breed, Esq., and the court filed a written order denying said motion. That counsel for defendants then and there duly objected to the presentation and filing of said answering affidavit, as aforesaid, on the ground that the motions had come on for hearing and determina-
[fol. 27] tion by the court and had been determined by the court on the 27th day of October, 1924, at which time the court had made its decision, and that said affidavit was accordingly presented too late to be considered by the court on any of the motions and upon the further ground that the defendants had been noticed for trial and were to be tried immediately on that day, without any opportunity of investigating or answering whatever allegations might be contained in said answering affidavit; and that the defendants had presented a proposed order to the court merely to complete the record of the presentation and decision of said motions by the court at a previous time, and that the presentation of said answering affidavit was therefore too late, inadmissible, incompetent at that time, and no proper part of the proceedings; but the court overruled said objections of the defendants, and ordered the defendants to be ready to proceed to trial; to which ruling of the court,

the defendants, by their counsel, then and there duly excepted.

That said answering affidavit alleged in substance that said affiant, J. T. Carroll, New York State Policeman, in company with Trooper Travis, were traveling on the highway from Massena, N. Y., to Hogansburg, N. Y., in an automobile on the first day of August, 1924. "That they met a Buick roadster, which was loaded very heavily. That Deponent noticed that the license plates were from a county in the *the* central part of the State. That these facts, together with the fact that the car was heavily loaded and [fol. 28] was traveling at a speed of about twenty-five or thirty-five miles per hour, and from his experience which he has had with the activities in transporting intoxicating liquors in the Northern part of the State, these facts lead him to believe that this was a load of intoxicating liquor. That Deponent and Trooper Travis turned around and apprehended the driver and occupant of said Buick Roadster. That said Buick roadster was being driven at that time by Rosario Gambino and the occupant was Joseph Lima. That these two were placed under arrest at this time. Deponent further says that at the time there were no Federal officers present, and that they were not working in conjunction with Federal Officers."

The Court then ordered a Jury drawn, and the case to proceed to trial.

The Government to maintain its case offered the following evidence, to wit:

By Joseph T. Carroll, New York State Policeman, that on August 1st, 1925, he and Trooper Travis were stationed for duty at Massena, N. Y. That at about 1 o'clock in the afternoon, he and Travis were traveling on the Massena-Hogansburg road, in a Ford car, and met the Defendants about three miles north of Massena, driving toward Massena in a Buick roadster. That they first observed the license plate was from the central part of the State, and that the "rear end hung pretty low" on Defendant's car. The witness was then asked by Mr. Breed: "What did that indicate to your mind?" To which question the Defendants, by their counsel, objected as calling for a conclusion,

[fol. 29] expert opinion, witness not shown qualified to answer, and should be confined in his testimony to what facts he observed and the Jury be allowed to form their own conclusions or opinions as to what was indicated by said facts. But the Court overruled the objection, to which ruling of the Court, the Defendants, by their counsel, duly excepted; and the witness then made answer: "There was a load of booze."

Witness then testified over an objection and exception of Defendants "I have been stationed up along the Northern border three years and eight months and have had considerable experience with cars transporting various liquors;" that "cars loaded or hanging that way have usually been loaded with booze coming from the border." That the two Troopers then turned their car around and followed Defendants' car to Rayno's garage, in the Village of Massena, in front of which the Defendants stopped. That witness Carroll then asked Defendant Gambino for his registration card, and that same was shown to him. That witness then asked Defendant what he had in his car and was told by Defendant to find out. That witness then asked for the key. That Defendant refused to give him the key. That witness then took his car and shook it and heard the bottles and asked how many cases he had on. That Defendant told him to find out. That Defendant Lima was meanwhile walking towards the garage. That Trooper Travis went and brought him back to the car. That Gambino got into the Ford car with witness and was driven to the police sta-[fol. 30] tion. That witness asked Defendant Lima where they got the ale. That Lima did not say they got the ale, but did say they came from Hogansburg. That witness had known Frank Rayno for about one year.

The witness was then asked: "Do you know what his reputation is up in that section with reference to bootlegging?" to which question Defendants objected as highly improper, suggestive and prejudicial. The Court then stated: "It has no bearing on any of the charges here." Mr. Breed then said: "But their stopping at this garage."

The Court: "Did he say the car stopped in front of Rayno's garage?"

Mr. Breed: "Yes, sir, and one of them got out and started to go in and the other one was in the act of getting out."

The Court then ruled: "It is admissible, not as to whether or not the defendants committed any of the crimes. As to those things, it is not competent and material at all, but it has a bearing on whether or not they had reasonable grounds to suspect that the automobile contained intoxicating liquors. So, on that ground and on that ground alone, the Jury will understand the objection is overruled." To which ruling of the Court the Defendants, by their counsel, then and there duly excepted. The witness then testified: "He has a reputation of being a big bootlegger," and that he ran this garage in Messena but not personally. These objectionable questions were then withdrawn and the answer stricken out at the request of the Government Counsel; and the witness was then asked: "Did you know at {fol. 31} that time on August 1st, 1924, what Mr. Rayno's reputation was for bootlegging up in that section?" to which question the Defendants, by their counsel, objected on the ground that it was leading, improperly suggestive to the Jury, but irrelevant, incompetent and immaterial and improper in form; but the Court overruled the objections, stating its reason for so doing as before, and the witness answered: "Yes, sir." Government Counsel then asked: "What was that reputation?" to which Defendants made the same objection, and the Court the same ruling; to which ruling an exception was taken by the Defendants. The witness then answered: "He had the reputation of being a bootlegger." That after leaving the garage the two Troopers and the Defendants drove to the police station at Messena, witness driving the Buick roadster with Lima riding with him, and Travis driving the Ford with Gambino riding beside him. That on arriving at the police station witness again asked for the key and was told to go ahead and find it; so he did and found it in the left hand side pocket of the car. That he opened the rear end of Defendant's car and found therein fourteen cases of Canadian ale with the bottles packed tightly neck to neck. On motion of Defendants, the Court ordered stricken out that part of the testimony in which the witness designated the

contents of the bottles as Canadian ale. That the witness did not taste or smell the contents of any of the bottles. That there were labels on the bottles, but was not allowed to describe the labels or testify to what was on them, be- [fol. 32] cause the Court sustained the objection of the Defendants that the labels themselves were the best evidence. That the witness then turned over the bottles and their contents and labels and everything that was on them, to Agent Robillard of the Border Patrol, in the same condition as they were when he took them out of the Buick car. That witness was then asked the following question:

By Mr. Breed:

Q. What conversation, if any, did you have with either of these Defendants at the police station there on that occasion?

A. After finding the beer in the car, or what we took to be the beer in the car at the time, I went downstairs and asked what they had on, and I went in the direction of Lima, and he said "I have a gun." He took a twenty-five Colt automatic out of his vest pocket and gave it to me.

Q. Lima did?

A. Yes, sir.

Q. Did you search him further?

A. We did.

Mr. Baxter: I object to that part of the answer in which he says, after such and such facts and suggests things that are not responsive to the question. The question called for the conversation and I move to strike out the gossip and that was relative to conversation.

The Court: What was the question?

(The stenographer repeated the question as follows: "Question: What conversation, if any, did you have with either of these Defendants at the police station there on the occasion? Answer: After finding the beer in the car, or what we took to be beer in the car, at that time, I went downstairs and asked what they had on, and I went in the direction of Lima and he said 'I have a gun.' He took a twenty-five Colt automatic out of his vest pocket and [fol. 33] gave it to me.")

The Court: It is true "he took it out of his pocket and gave it to me" is not responsive. If you want to object to it, he will have to put it in another question.

Mr. Baxter: Also preliminary remarks, after such and such things were taken from the car, designating it as beer.

The Court: It is harmless. We won't bother to strike that out.

Mr. Baxter: Exception.

The Court: Strike out if you want to that he took a twenty-five, whatever he said, about the revolver. You will have to put that in a separate question, if you want it.

Mr. Breed: Do you insist on your objection as not responsive, Mr. Baxter?

Mr. Baxter: I am endeavoring to defend two men, and I insist on anything.

Mr. Breed asked witness the following question: "At that time did you see anything on Lima with reference to a gun or anything like that? to which question the Defendants made objection that it was leading and improper in form; but the Court overruled the objection, to which ruling of the Court the defendants, by their counsel, then and there duly excepted. Witness then testified that he searched Defendant Lima and found a twenty-five Colt automatic in his pocket with a few shells fitting the same. That the other Defendant was there at the time, and when asked by witness if he had a gun, said he did and produced it from his hip pocket. That witness then searched said other Defendant Gambino and found his pockets just money and papers. That both guns were loaded at the time witness took them from Defendants. That Defend- {fol. 34} ants told witness they lived in Utica, N. Y. That he asked defendants where they got the load they had on, but that Defendants did not answer. That witness then checked up the license number of Defendants' car. That he thought he had now told the Court and Jury everything that happened on this occasion. That he then arraigned these Defendants before the United States Commissioner and Defendants waived examination and were held by the Commissioner.

The direct examination of Trooper Carroll was then suspended and Trooper Travis called as a witness, who testified that on August 1st, 1924, he was stationed at Massena, N. Y., with Sergeant Carroll, the former witness. He had been a trooper for 18 months stationed along the Canadian border. That in the early afternoon of said date, he was riding with Trooper Carroll in a Ford car on the Massena-Hogansburg road, and that Hogansburg was on the border line of Canada, and fourteen miles from Massena. That they met the Defendants about three miles out of Massena in a Buick roadster, and that the first thing he noticed was the "auto county license," The Defendants objected to the testimony and moved to strike it out as being an opinion or conclusion of the witness, rather than a fact. But the Court overruled the motion and defendants excepted. The Prosecuting Attorney then asked, "And from the data which you have you were able to determine that it was from out of the county?" to which question the Defendants objected as leading and improper in form; but the Court overruled the objection, defendants excepted and witness answered: "Yes, sir." That witness [fol. 35] did not know at that time from what county the car was licensed; that the car seemed to be heavily loaded, and the rear fender was riding close to the wheel, in the way that generally indicates a loaded car. The defendants moved to strike out this part of the testimony, but the Court overruled the Motion, and the Defendants excepted. That the Troopers then turned around and followed the Defendants' car.

The Court then recessed until noon, May 18th, 1925, at which time Trooper Carroll was recalled.

An automatic pistol was marked Government Exhibit No. 1 for identification; magazine marked No. 2 for identification, revolver marked No. 3 for identification; and cartridges marked No. 4 for identification.

"Exhibit 1 is the gun found on Lima, in his right hand vest pocket. Exhibit 2 was in the gun at that time and loaded. There was a cartridge in the chamber. Exhibit 3 Gambino had in his right hand hip pocket. The chamber was loaded. The Cartridges, Exhibit 4, are the same calibre and same kind of cartridges as Defendants had." Wit-

ness testified that Government's Exhibit No. 4 "are the same calibre and same kind of a cartridge" as those he took from Defendants on the occasion of their arrest.

Government's Exhibits Nos. 1, 2, 3 and 4 were then offered in evidence. Defendants objected to their receipt on the ground that they were irrelevant, incompetent and immaterial, had no bearing on any of the issues in the case and were improperly suggestive and prejudicial*y* to Defend-
[fol. 36] ants; but the Court ruled that "*that* these things are competent evidence upon one of the charges in the case, namely, the question of conspiracy"; and overruled Defendants objections, to which ruling of the Court, the Defendants, by their counsel, then and there duly excepted. The Court then ruled that only Exhibits Nos. 1, 2 and 3, were received in evidence at that time, and reserved decision as to Exhibit No. 4, to which ruling the Defendants also excepted.

Counsel for Government then asked to have a bottle marked Exhibit No. 5 for identification, and then asked witness if said Exhibit 5 was similar to the bottles taken from the Defendants on the occasion in question, with the exception of a square label with typewriting on it, and witness answered: "It is." Counsel for Defendants objected to the question and moved to strike out the answer on the ground that it was irrelevant, incompetent and immaterial, and an improper form of proof, the said offered exhibit not being shown to be in any wise connected with any of the issues in the case and not the best evidence.

Mr. Breed then stated: "I expect to connect this bottle up with the seizure. I merely wanted to ask him this one question, and if it is not connected up, I will consent that it be stricken out."

The Court: "On that statement of Counsel, objection overruled."

To which ruling of the Court, the Defendants, by their counsel, then and there duly excepted.

Witness then testified that he turned the whole load and the guns and the car over to Mr. Robillard.

On cross-examination, witness testified that on the day in question, he and Trooper Travis were traveling northerly
[fol. 37] from Massena in a Ford car at about twenty miles

per hour. Witness was driving the car, and on meeting the Defendants' car, which was traveling from twenty-five to thirty-five miles per hour, in the opposite direction, he looked and saw the two Defendants in that car. That he also "noticed the numbers, as there was an Oneida county license on it," and the rear end of the car and its loaded condition, although the two cars were passing each other at a relative speed of forty-five miles per hour, or greater. That said Troopers then turned around and followed Defendants' car, to in front of Frank Rayno's garage. That Defendant Gambino then invited witness to find out what was in the car. Counsel for Defendants then questioned witness with respect to his knowledge of his rights and duties in searching car on such occasions, but counsel for the Prosecution objected to such questions, and the Court sustained the objections; to which rulings of the Court, the Defendants by their counsel then and there duly excepted. Witness then testified that after shaking Defendant's car he arrested the two Defendants and told them he was going to take them over to the station, while he looked over their car.

Q. And did they make any objection to your taking them over to the station?

A. No, sir.

Q. You told that to these two Defendants together, or did you make a separate statement to each of them?

A. They were both within hearing at the time.

Q. Did you give them any further directions as to how you were going to take them over?

A. Yes, sir.

[fol. 38] Q. What were those?

A. I told Lima to get into the car, that is, the Buick roadster, and Gambino to get into the Ford.

Q. Did either of these Defendants make any reply to that order by you?

A. Lima said he would not drive the car.

Q. Is that all he said?

A. That is all I recall; yes, sir.

Q. Did Gambino make any statement at that time?

A. He wanted to know if he could not fix it up.

Q. How do you know he wanted to know that?

A. I beg your pardon?

Q. How do you know that Gambino wanted to know if he couldn't fix it up?

A. That is what he asked me.

Q. He stated to you there something on that subject, did he?

A. Yes, sir, he did.

Q. What was it?

A. He asked me if he couldn't fix it up.

Q. And how many people were present at that time?

A. Why, there was Lima and my partner somewhere in the vicinity.

Q. And weren't there some other people standing about?

A. Not near the car; no, sir.

Q. And that was just before he got into the car?

A. Just a short time before that; yes, sir.

Q. And what reply did you make to him?

A. I told him "No, of course not."

Q. Is that all the conversation that took place before they got in the car?

A. That is all I recall.

Q. You did not tell them why you were arresting them, beyond what you have already said?

A. No, sir, I don't think, I did.

Q. Well, you know whether you did; don't you?

A. Why, no, that is some time ago.

Q. Now, when you came to the back end of this car and shook it, as you said, will you tell us in detail just what you did and heard?

A. Why, I kind of lifted the back end of the car and let [fol. 39] it drop and you could hear the bottles clink.

Q. Very loud?

A. Why, not so awful loud; loud enough to hear.

Q. Well, did anyone else hear it besides you?

A. Anyone could, if they had been within hearing; yes, sir.

Q. Was there anybody else within hearing?

A. I don't know.

Q. Well, you were there; weren't you?

A. Yes, sir.

Q. You could see who was around there?

A. Yes, sir.

Q. And you know how loud those bottles clinked?

A. Loud enough to hear it, yes, sir.

Q. Was there anyone else in that vicinity close enough to hear them clink?

A. I don't recall whether there was or not.

Q. You didn't say anything to anyone that you had heard bottles clink at that time, did you?

A. Yes, sir.

Q. To whom did you say that?

A. My partner and also the two Defendants.

Q. You said it to the two who?

A. Gambino and, if I am not mistaken, Lima also.

Q. Was there anybody else present when you made that statement?

A. My partner was there; yes, sir.

Q. And then you got in the car and went away?

A. Yes, sir.

Q. And the only ones that were there were your partner and yourself and these two Defendants during all that time, is that so?

A. No, sir. There were other people standing around, but I don't know whether they were close enough to hear the conversation carried on or not.

That after being told by Defendant Gambino "to find out" what was in the car, he then immediately kind of lifted the rear end of Defendant's car and let it drop, and heard bottles clink. That he asked for the key before and after but that he did not recall asking Defendant for a key to open the rear end of the car in the meantime. That [fol. 40] he had not so testified on his direct examination. The following part of his direct testimony was then read to him: "I asked for the key. He refused to give me the key, so I took his car and shook it, and I heard the bottles, and I asked how many cases he had on." Witness then recalled so testifying and testified that his refusal to give him the key did not seem at all consistent with their telling him to go ahead and find out, so that when he shook the car, he was not exactly doing it with their permission; that he took it they did not care whether he shook it or not, and yet weren't going to help him. That he thought they did not want him to shake the car. That perhaps, he did, after Defendants refused to give him the key, go

to the garage and ask the men there if they had a key with which he could open that car; but that he didn't know whether he did or not. That when they arrived at the police station, he searched the persons of Defendants, and had told in good faith, on his Direct Examination, all that had been seized from them; that he did not say anything about seizing permits from a Court of Record, licensing the Defendants to carry the firearms seized from them because that had not been asked.

Witness was then asked: "And at the time, you told these Gentlemen of the Jury that you have in good faith stated all you remembered finding, you knew at that time that you found also and had delivered over to you, in your possession, valid permits from a Court of Record authorizing these men to carry those revolvers, is that not true?

Counsel for the prosecution objected to the question on [fol. 41] the ground that it was argumentative, and stated facts not in evidence, and stated to the Court that the witness had not been asked, upon direct examination, to tell all that was found upon the persons of the Defendants. Defendants' counsel called attention that the witness had been asked and had answered that question on Cross-Examination and had so qualified himself for this question. But the Court sustained the objection, to which ruling of the Court, the Defendants, by their counsel, then and there duly excepted.

Witness then testified that at the time he opened the rear compartment of Defendant's car at the police station, he noticed that the bottles were packed in well with excelsior or something like that, so that they would not break against one another, but not packed in tightly, and not loosely, but loose enough to rattle. That he took some of the bottles out of the rear compartment and saw some others taken out, but did not see them all taken out, and saw an attempt made to put them back in, but that all of the bottles would not go back in, because they were not packed the same way, and some of them were put in the front seat of the car. That he did not drink or taste any of the contents of the bottles and did not see any drank while he was there

That the car was then taken "behind the police station, until turned over to the agents of the Border Patrol."

Witness was then asked: "Is that all that was done with it?" to which question the United States Attorney objected on the ground that it was immaterial. The Court then [fol. 42] ruled: "Objection sustained, unless you contend it was delivered to some other person in the interim. If you contend that, you may ask him that question exactly." "The disposition of the car after the seizure is of no or little materiality in this case. It has no bearing on whether or not they committed the crimes charged. What difference does it make what was done with the car?" to which Counsel for Defendants replied: "We have not yet, if the Court please, had any testimony as to the contents of those bottles. Now, if I can show that they took this car out and took a joy ride around, and some time later brought it back and then made a delivery, it seems to me it would be competent." The Court then overruled the objection.

Witness then stated that he did not understand the question and Counsel for the Prosecution objected that the question was incomprehensible; whereupon, Counsel for Defense withdrew the question and asked the following question: "After you brought the car to the station, and before you delivered it over to the agents, what was done with the car?" and witness answered: "Completely unloaded, and the car itself was taken behind the police station." That the car was turned over to the Federal Officer completely unloaded and reloaded after such delivery. That witness had made an answering affidavit to preliminary motions in the case on the day before the beginning of the trial. That Mr. Breed did not give him any reason for wanting the affidavit other than that he wanted the facts briefly. That witness did not know as Mr. Breed [fol. 43] said he wanted all the facts. That witness had a conversation with Mr. Breed and Mr. Breed then dictated the affidavit, asking witness if that were true in regard to the parts as they were dictated. That Counsel for Defendants was standing there at that time and heard the affidavit dictated. That witness did not recall that Mr. Breed asked him if there was anything more. That Mr. Breed dictated the statement and asked witness if he was right. The Court then ruled that Counsel for Defendant

should first refer to something in the affidavit claimed to be inconsistent with witness' testimony at that time, before questioning witness further on the subject. Counsel for Defense then asked witness if he stated anything about shaking the car or hearing bottles rattle, in that affidavit, and witness replied that he did not know whether he did or not. Counsel then asked: "Did Mr. Breed ask you, after you had make your statement, if there is something further, and did he suggest that you put in something further?" to which Mr. Breed objected. The Court sustained the objection, and the Defendants excepted to the ruling. The Court then ruled: "If there is anything in this affidavit which you say is inconsistent call his attention to it, and ask him what it was, and then, if you want to go into circumstances under which such statement was made, under reasonable limit, you may do so; but until there is something in the affidavit, which, from your view, is inconsistent with something he has testified to to-day, you can not go into that question any further," to which ruling of the Court the Defendants, by their counsel, then and [fol. 44] there duly excepted and said counsel stated: "I am trying to just get, if I can, if the Court please, whether or not this witness, at that time was asked to state fully, and was aided by suggestion of counsel in stating fully, all the facts." The Government counsel then stated: "We are not concerned whether he was asked to state fully the facts, or whether or not he was asked only four or five questions." Defense Counsel then stated: "I want to show it because it is very enlightening." The Court then ruled: "We will not have any further remarks in the presence of the Jury on that subject. We will have to go directly to the affidavit. Otherwise, the Court will exclude any further testimony about this time and place as to which you have been interrogating. The witness has answered you that he does not know whether there was or not at that time. That question was not objected to, but if there was an objection it would have been sustained." The Prosecuting Attorney then objected and moved to strike the answer out. The Court granted the motion, to which ruling of the Court, the Defendants by their Counsel then and there duly excepted.

The affidavit referred to was then produced and identified by the witness and offered by the defendants in evidence

for the sole purpose of showing that there was not any statement in it about shaking the car or hearing bottles rattle. The Court then stated: "If you offer that in evidence it will be received unconditionally."

Mr. Breed: "And there will be no objection."

[fol. 45] Mr. Baxter: The only condition I wish to impose is that we do not admit any of the facts therein stated to be true."

But the Court ruled it could not be received under such conditions, but if received that either counsel could draw any inference they thought it bare, to which ruling of the Court, the Defendants by their Counsel then and there duly excepted.

The witness then testified on redirect examination that in a small compartment back of the seat of Defendant's car, he found bottles similar to Government's Exhibit No. 5, and labels on them similar to Government's Exhibit No. 5, to which counsel for the Defendants objected, as being not the best evidence and an improper form of proof. But the Court overruled the objections, to which ruling of the Court, the Defendants duly excepted.

Trooper Travis was then called and on continuation of direct examination testified:

That they overtook Defendant's car in front of Rayno's garage in the Village of Massena. That Defendant Lima jumped out of the Buick car and ran inside of the garage followed by witness, who overtook him in the garage and brought him back. That Gambino was still in the Buick car. That no effort had been made to get into the car that he knew of. That he then took Gambino in the Ford car and drove to the police station at Massena. That Sergeant Carroll and Defendant Lima went to the police station in the Buick car. That he did not recall hearing any conversation in front of the garage. That at the police station the two loaded guns were taken from Gambino and Lima and cartridges and some money, and they showed their revolver permits. That the car and other property seized [fol. 46] from Defendants were turned over to Inspector

Robillard. That he noticed the little compartment in the back of the car. That witness assisted in unloading the bottles from Defendant's car. That Government's Exhibit No. 5 for identification was similar to bottles taken from Defendant's car; and that the labels on said bottles were similar to the label on said Exhibit No. 5.

The Defendants objected to the testimony on the same grounds as they objected to similar testimony when given by witness Carroll, but the Court overruled the objections as before, to which rulings the Defendants duly excepted.

That witness counted the bottles that were in the rear of Defendant's car and they numbered 336 bottles. That the guns and the bottles and their contents were turned over to Mr. Robillard, in the same condition as when they were seized.

Henry Robillard, called as a witness by the Prosecution, testified:

That he was a Deputy Collector and Inspector of Customs stationed at Malone, N. Y., and working under F. S. Steenbaerge, who was also a Deputy Collector of Customs. That on August 1st, 1924, he saw Trooper Carroll and Trooper Travis and the two Defendants at the police station at Massena. That he tried to question the Defendants, but they would not answer or talk to him. That there was a Buick roadster, 336 bottles of Canadian ale, a .25 Colt automatic, and a .32 Dreys revolver, turned over to him by said State Troopers, on that date. That Government's Exhibits Nos. 1, 2, 3 and 4 were so turned over to him. That [fol. 47] immediately thereafter he took four bottles up to the office at Malone and locked them up and next day he turned them over to Mr. Steenbaerge, in the same condition in which he had received them from State Troopers. That Government's Exhibit No. 5 was one of the bottles he had turned over to Mr. Steenbaerge on that day.

To all of which testimony the Defendants, by their counsel, objected on the ground that it was irrelevant, incompetent and immaterial. That it was statements of conclusion or opinion on the part of the witness. That the witness

was not shown qualified to give such opinion evidence; and that said evidence was not a statement of facts within the witness' knowledge. But the Court overruled the objections, stating that Counsel for the Defense might interrogate the witness on cross-examination about his knowledge. To which rulings of the Court the Defendants, by their counsel, then and there duly excepted.

That at the time he turned said Exhibits over to Mr. Steenbaerge, he stated to him where he got them, and that Mr. Steenbaerge wrote the label out on the typewriter and put it on Government's Exhibit No. 5.

To which testimony the Defendants, by their counsel, made the same objections. The Court made the same rulings, and Defendants duly excepted. The same testimony was given as to Government's Exhibit No. 6, over the same objections and exceptions of the Defendants.

F. F. Steenbaerge, called as a witness for the Prosecution, testified:

That he was a Deputy United States Collector of Cus- [fol. 48] toms stationed at Malone, N. Y., and was on August 1st, 1924, at which time he had fifteen men working under him, one of whom was the previous witness Robillard. That he recalled Mr. Robillard turning over some bottles with labels on to him, on August 2nd, 1924. That he could not say whether he pasted the typewritten labels on Government's Exhibits Nos. 5 and 6, which were two of said bottles, or whether one of the men in the office pasted them on.

To which testimony the Defendants, by their counsel, duly objected as irrelevant, incompetent and immaterial. But the Court overruled the objections, to which rulings of the Court, the Defendants, by their counsel, then and there duly excepted.

The witness put eight ounces of the contents of Exhibit No. 6 in a container, sealed it with sealing wax, marked it for identification, and it was sent under registered mail to

the United States Chemist for analysis, on or about the 25th day of August 1924.

Government's Exhibit No. 7 for identification was then shown witness, who testified that it was the bottle in which he put the contents of Exhibit No. 6 and forwarded it to the United States Chemist for analysis. That in witness' presence, a Mr. Whitney, Deputy Collector under witness, put part of the contents of Exhibit No. 6 into Exhibit No. 7 "if that is the bottle and it looks the same," and immediately sealed it and stamped a letter "S" on the top of the bottle in the sealing wax, and sent it by registered mail to New York City. That the cap was not removed from No. 6 until part of its contents was put in No. 7 as de-
[fol. 49] scribed.

To which testimony the Defendants made the same objections as before, the Court the same rulings, and the Defendants excepted.

That witness kept Exhibits Nos. 5 and 6 in his possession from the time they were turned over to him by Mr. Robillard until he took the contents from one of the bottles and put it into the other bottle to send to the Chemist for analysis, and that the bottles were in the same condition throughout that time.

Defendants made the same objection as before, the Court the same rulings, and the Defendants excepted.

That witness did not know exactly whether Exhibit 7 was in the same bottle he forwarded or not. That "I think it is. I do not think that label could have been taken off and pasted on another bottle." That he knew the label was the same one and that — bottles were similar in all respects. That he had kept Government's Exhibit- Nos. 5 and 6 for identification, continuously in his possession since the 25th day of August, 1924. That they had been wrapped with paper around each bottle and two wrapped in a package and tied up with twine and tagged with the number of the case and stored away with witness' other samples in a room adjacent to his office in Malone.

To which testimony the Defendants objected as before, the Court overruled objections and Defendants duly excepted.

That Government's Exhibit No. 5 was in all respects similar and in the same condition as it was the day it was turned over to witness, with the exception of the typewritten label.

Defendants made the same objection. Prosecuting At- [fol. 50] torney stated he was referring not to the contents of the bottle, but to its physical features and was excluding the typewritten label Mr. Steenbuerge had pasted on it. The Court overruled objections and Defendants excepted.

The Court then recessed until May 25th, at which time Trooper CARROLL was recalled and testified:

That at the time of arresting the Defendants they told him they lived in Utica.

JOSEPH D. RUBIN was next called by the Prosecution and testified:

That he was a chemist employed by the United States Government at New York City, and had been for more than a year. That Government's Exhibit No. 7 was received at his place of business on Washington Street, in New York City, during the latter part of August, 1924. That he made a chemical analysis of the bottle for the alcoholic content, and was then asked to state what he found said alcoholic content to be.

Defendants objected on the grounds that the search and seizure by which this sample was alleged to have been obtained was made without any warrant or authority in law, and in violation of the constitutional rights of these Defendants, to be immune from unreasonable searches and seizures of their persons, property and effects, to not be deprived *to* their property without due process of law and to not be compelled to give evidence against themselves, as guaranteed by the Fourth, Fifth and Sixth Amendments to the Constitution of the United States; that said arrest and

[fol. 51] seizure was not authorized by Section 26 of Title II of the National Prohibition Act, under which said Officers assumed to be acting; that there was not any State law, under which said officers claimed to be acting; that upon the further grounds that there was not sufficient evidence that the sample, an analysis of which was then being offered in evidence, was ever in the possession of or being transported by either of these Defendants.

The Court then inquired of Counsel for Defense wherein the proof failed; and Counsel pointed out as follows: One Federal Officer Robillard says that on the 1st day of August, 1924, there was delivered to him by the State Troopers a certain number of bottles. That four of these bottles were the next day with their contents delivered to Deputy Collector of Customs Steenbaerge. There was no testimony of any marking nor identification nor sealing. They were then kept, according to the testimony of the Deputy Collector, for more than three weeks, unsealed, unprotected from any alteration, addition or chemical change. That the proof fails in the continuity of possession, and in the identity of the article. Robillard testified that he saw Steenbaerge seal it on August 2nd; Steenbaerge testified that he either labeled it or saw it labeled at that time. That more than three weeks thereafter, to wit, on August 25th, he had Exhibit No. 7 sealed and mailed to the chemist from his office. The evidence of these witnesses is too indefinite, and uncertain, to constitute legal grounds for receiving the analysis offered in evidence, and such testimony as they [fol. 52] do give, consists mostly of their conclusions and their opinions, and fails to recite facts within their knowledge sufficient to constitute proper grounds for admitting the testimony of the chemist as to his analysis.

Witness STEENBAERGE was then recalled by Counsel for the Prosecution and was asked: "State what you know about this label on that bottle, Exhibit No. 7." And witness testified: "That label was typewritten in my office and given to me and I put my letter on it and gave it to Mr. Whitney, who is a Deputy Collector, and in my presence he pasted this label on the bottle, put the contents of one of

these bottles" (supposedly in Government's Exhibit No. 7) "sealed it up with red sealing wax, and put a seal, letter "S" on top of the sealing wax, and it was put in the container and packed in cotton batten and sent by registered mail to United States Appraisers' office at New York City." Witness then testified that he delivered last Tuesday Government's Exhibit No. 5 for identification, at request of Prosecuting Attorney, to Mr. Rubin, the chemist, who had been called as a witness in this case.

The Prosecuting Attorney then asked: "And did you deliver it to him in the same condition as it was when you received it?" The Defendants, by their counsel, objected to the question as leading, as calling for a conclusion, and as being improper in form. The Court then asked Counsel for the Prosecution what the question referred to. Counsel answered, "to Government's Exhibit No. 5 for identification."

The Court: "To whom did he deliver it?"

Mr. Breed: "To Mr. Rubin, the chemist, who was on [fol. 53] the stand a few minutes ago."

The Court: "Recently?"

Mr. Breed: "Yes, sir."

The Court: "When?"

Question by Mr. Breed. "When did you deliver it to Mr. Rubin?"

Witness: "The day that Court was held here, or adjourned, I mean."

Question. "Last Tuesday?"

Answer. "That was the day."

The Court: "The question is did he deliver it to him in the same condition as now?"

Mr. Breed: "No, the same condition as when Mr. Steenbaerge received it from Mr. Robillard."

The Court: "Of course, he testified he took some of the contents out after receiving it from Mr. Robillard."

Mr. Breed: "This is not the bottle."

The Court: "It is not the bottle?"

The Witness: "No. It is full."

The Court: "Objection overruled."

To which ruling the Defendants, by their counsel, then and there duly excepted.

Counsel for the Prosecution then repeated the question in the following form: "Did you deliver it to him in the same condition as it was when you received it from Mr. Robillard?"

Witness: "I should say it was in the same condition with the exception that when it was received by me, this label was not on the bottle. That was put on in my office, and there may have been a small label on there. But with those exceptions, it was the same."

Mr. Baxter: Just a moment, I object to that part of the testimony which is not responsive to the question, and I move that it be stricken out.

The Court: "I think I will let it stand. It will only require another question, and it is appropriate to the subject [fol. 54] under examination."

To which ruling of the Court, the Defendants, by their counsel, then and there duly excepted.

The Prosecuting Attorney then asked: "And, that is, you delivered it to the chemist in the same condition as it was when you received it, with the exception of the typewritten label on it?" The Defendants objected to the question, as being improper in form, leading and calling for a conclusion, and the witness not shown qualified to answer. The Court then ruled: "It is unquestionably leading; but a summary of what he has testified to."

Mr. Breed: "Yes, it is but a summary of what he testified to."

The Court: "And, for that reason, it is repetition and is not necessary, but you may have it for the purposes of clarity."

To which rulings of the Court, the Defendants, by their counsel, then and there duly excepted.

Witness answered: "Yes sir."

On cross-examination witness was asked how he was able to say that the contents of that bottle was in the same condition at the time he delivered it to the chemist on the 18th day of May, 1925, as it was at the time he received it on the 2nd days of August, 1924. In reply he stated: "Why, I could say it was in the same condition with the exception of

the label on there." And being further pressed as to his knowledge or reason for saying so, testified that he had no knowledge or reason. That he did not know what the contents are. That he did not know at any time as to the contents of the bottle. And that he meant by his testimony to refer only to the label and the bottle. Defendants, by [fol. 55] their counsel, then moved, in view of this testimony, to strike out the former testimony of the witness, on the subject, but the Court ruled: "I am not sure that the witness understood exactly your questions. The District Attorney may ask him further, if he cares to."

On re-direct examination of the witness the following question was asked: "You know the contents which were in the bottle when you received it from Mr. Robillard were the same contents which you turned over to Mr. Rubin?" Counsel for Defense objected to the question as leading. The Court ruled: "It is leading in form. Ask him Do you know, etc."

By Mr. Breed: "And do you know?"

Answer. "I do know."

Question. "And were they the same?"

Answer. "Yes, sir."

Question. "The same contents?"

Answer. "The same contents."

Question. "And you are referring to Government's Exhibit No. 5 for identification?"

Answer. "Yes, sir."

The Court. "The motion to strike out is denied," to which ruling of the Court the Defendants, by their counsel, then and there duly excepted. The cross-examination was then continued and the witness as asked: "How do you know?" and he answered: "That bottle was in my possession in my office and under my supervision until it was brought here; and while here, at Court, it was in my possession, when it was not locked up under my supervision, until turned over to Mr. Rubin, and it has not been tampered with." That he did not watch it for the nine months personally, but could tell whether the cap had been taken off [fol. 56] the bottle and another one put on. That he could tell it because it had not been. That he knew it was not long in his office or while he was at Court. That he wasn't in his office watching it, but knew it was taken proper care

of. The witness was then asked: "How do you know that?" and answered: "How do I know anything? I have sworn I know that." That the sample was packed away under the supervision of witness by Deputy Whitney, who was the only one that had anything to do with that sample "only himself." The witness: "This sample was labelled in my office the same day that I received it from Mr. Robillard, and it was packed away with similar samples which I have in the office, and there was no one that had access to my office with the exception of men who were under my employment, my own official family." That he did not watch said Whitney for those three weeks between August 2nd, 1924 and August 25th, 1924. That he knew it because he had sworn before that it was in the same condition. That he could tell by this bottle and another bottle from observation. That if the cap had been removed, the contents would become stale and without foam. That the cap cannot be taken off and put on properly; that it would have "to be put on with a machine and have to be Dow's Canadian Ale, or some others, and the cap would have to be put on in that way," and that on such machine and no such caps had been used on bottles in his office. Counsel for Defense moved to strike out that part of the answer referring to Canadian ale or some particular brand. But the Court denied the motion and the Defendants duly [fol. 57] excepted.

That samples are labelled as they come into witness' office and packed away with other samples and not removed from that place until by witness' instructions. That when that sample was taken from the other samples, it was taken by instructions of witness by Mr. Whitney. That wtiness gave Whitney the label to put on the Exhibit No. 7, the contents of which were taken from one of the four bottles.

That he could not say on just what date the label was placed on Exhibit 7, but it was the same day it was sent to New York City. Defendant, by their counsel, moved to strike out witness' testimony as not being responsive to the question how he knew the contents of Exhibits Nos. 5, 6 and 7 were the same and in the same condition from the time he received samples from Mr. Robillard until samples were turned over to the United States chemist. But the court denied the motion, to which ruling of the Court the

Defendants, by their counsel, then and there duly excepted. That the 25th of August, 1924, was the time witness put his initials on the typewritten label on Exhibits Nos. 5 and 6 That that was the first date he had put any mark of identification on samples or Exhibits Nos. 5 and 6. That he knew the typewritten labels were pasted on in his presence and in his office, but he did not know when. Asked how he knew it was done, if he did not know when it was done, witness testified: "I swore I either saw it or done it:" That he did not know whether he had any further knowledge than what he had sworn to or not. That he had given [fol. 58] what knowledge he had and what he could recall. That no mark of identification was put on the cap of the bottle at any time. That he was not able to distinguish that particular cap from thousands or millions of others of the same kind. That he did not know whether it was the same cap on any of the bottles at any time, as at the time he had received the bottles. That he did not know whether there were many cappers that fit that size cap and that size bottle, but had seen some. To the question: "The only knowledge you have is that which you have already recited, that at the time the contents were taken from it, you saw a cap on it and that it appeared to be lively at that time?" Witness testified that was not the only reason: and being asked: "What additional reason have you?" testified that the bottle was turned over to him by Deputy Robillard. That he signed his name on typewritten labels which were either pasted on the bottles by witness or in his presence and the said bottles were packed away with samples which he retained for evidence and were not taken from the place until sent to United States chemist for analysis under instructions of witness. The Defendants then moved to strike the answer out as not being responsive and as being a statement of conclusions or opinions of witness rather than of facts within his knowledge. By the Court denied the motion, to which Defendants, by their counsel, duly excepted. The Court then ruled: "You asked him for what other reasons and he has given you an answer at some length. I hold that is a responsive answer and deny your motion to strike it out, and [fol. 59] I do not see any occasion for repeating the question and I shall sustain the objection to your repeating

the question," to which ruling of the Court the Defendants, by their counsel, duly excepted. Witness was then asked: "Now have you stated all the reasons you have for saying that you know the contents of that bottle Exhibit No. 6 were the same when delivered to you, as when you poured a part of it into Exhibit No. 7?" and answered: "I could not answer that question yes or no. I think it is all the knowledge I have, but there might be some other knowledge. I do not recall at the present time." Counsel for the Defense moved to strike out the answer as not being in accordance with the instruction of the Court to answer yes or no. The Court denied the motion and the Defendants duly excepted.

After the noon recess and on re-direct examination witness testified that he received Government's Exhibits Nos. 5 and 6 from Mr. Robillard on the 2nd day of August, 1924. Witness was then asked "What did you do with reference to them?" Counsel for Defendants objected to the question as repetition, the witness having already testified fully on the subject. The Court ruled: "He did at some length on cross-examination, and to think on the direct also."

Mr. Breed: "This is only to clear up the impressions that Mr. Baxter has just made in the minds of the Jury."

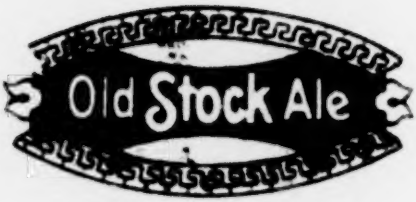
The Court: "Objection overruled."

Mr. Baxter: "And exception."

The witness then testified that from the time he received [fol. 60] these bottles on August 2nd, 1924, in his office and signed these labels, that were there placed on the bottles, they were put away with the rest of his samples, until the 25th day of August, 1924, when they were taken out and a part of the contents of one bottle put in a container, sealed with wax on which was stamped the letter "S" and sent by Registered mail to the United States chemist's office in New York City. That the empty bottle and the full bottle were then wrapped in paper, tied up with string and tagged and filed away in the room where witness kept all his samples that have been sent away. That the full bottle, Exhibit No. 5, was kept there until witness brought it from Malone to the Court and turned it over to Mr. Rubin, the chemist. Prosecuting Attorney then asked: Whether or not it was in the same condition when you turned it over to Mr. Rubin

the chemist, last Tuesday (May 18th, 1925) as you have stated, as it was when you received it from Mr. Robillard, August 2nd, 1924, as you have heretofore testified, with the exception of the typewritten label, which appears on the Exhibit?" Defendants objected to the question as being leading, improper in form, and called for a conclusion of the witness. But the Court overruled the objection, to which ruling of the Court the Defendants, by their counsel, then and there duly excepted. The witness then testified: "It is."

Witness RUBIN was recalled for the Prosecution and was asked by the Prosecuting Attorney: "Now, Mr. Rubin, will [fol. 61] you state the alcoholic contents of Government's Exhibit No. 7?" The Defendants, by their counsel, objected on all the grounds previously stated and that the evidence had been unlawfully obtained by two State Troopers, who, according to their own testimony, were not authorized by any State or Federal law, to interfere with the liberty or property of the defendants. That their action in making this search, seizure and arrest, was in itself, a violation of the Criminal Law. That it was contrary to public policy for the Court to receive at their hands evidence which had been shown to have been obtained by such lawlessness and criminal interference with the liberty and property of citizens. But the Court interrupted as follows: "State your objections without argument. Objection overruled," to which ruling of the Court the Defendants, by their counsel, then and there duly excepted. The witness then answered: "5.90% absolute alcohol by volume." Witness then testified over objections and exceptions of Defendants that Exhibits were fit for beverage purposes. That Exhibit No. 5 was turned over to witness by Mr. Steenbaergo August 18th. That the bottle was full at that time. That there was a cap on the bottle at that time. That witness made a chemical analysis of the contents. That the alcoholic content was a 5.90% absolute alcohol by volume, and that it was fit for beverage purposes. To all of which testimony Defendants, by their counsel, then and there duly objected, but the Court overruled the objections, and the Defendants, by their counsel, duly excepted.


Old Stock Ale

THE NATIONAL BREWERIES LIMITED
PALE BITTER ALE
Wm. DOW & Co.
MONTREAL

[fol. 62] Government's Exhibit No. 4, cartridges, were then offered in evidence. The Defendants objected as being irrelevant, incompetent and immaterial. The Court ruled there must be continuity of possession shown. Defendants waived continuity of possession objection, stating by their counsel that they wanted this objection squarely on the inadissibility of the evidence as being irrelevant, incompetent and immaterial. The Court then overruled the objection and received the evidence, to which ruling of the Court, the Defendants, by their counsel, duly excepted.

Government's Exhibits Nos. 5 and 6 were then offered in evidence. The Defendants, by their counsel, objected on all the grounds previously stated and upon the further ground that some notations had been added, some purported statements of fact which were not made in the presence of the Defendants, referring to the typewritten labels. The Court ruled the objection as to the typewritten labels was sustained, but the bottles with their printed labels were received in evidence, to which ruling of the Court the Defendants, by their counsel, then and there duly excepted.

Government's Exhibit No. 7 was then offered in evidence and received over like objections and exceptions, of defendants.

(Here follows Government's Exhibit No. 7, marked side folio page 62a)

On cross-examination witness testified: That bottles containing a cereal beverage implanted with the yeast or fermentation principle which produces alcohol, kept during [fol. 63] the month of August, subject to the summer heat and being below one-half of one per cent of alcoholic content on the 2nd day of August, might develop not over 2-10 of 1% greater alcoholic content. That if the caps were not on, it might increase up to 11%. That the fact of their being capped in the opinion of the witness limited fermentation in this way; that if it is capped and fementation takes place, carbon dioxide would be generated, which would increase the pressure and break the bottle, and the fact that the bottle was not broken shows that no fermentation of any appreciable quantity took place. That if there was a

slight leak of gas at the bottle cap, there would be no pressure in it. That pressure was there when witness opened the large bottle on May 18th, so that he knew it had not leaked. That if the cap leaks slightly under the pressure of fermentation, so that there was an escape of gas from the bottle, the alcoholic content might increase from below one-half to more than eleven per cent during the time from August 2nd to August 25th. That witness had no knowledge of any of these bottles until his arrival to testify at this trial when one was turned over to him, except the small bottle, Exhibit No. 7, which had been previously received by him through the mail, and knew nothing about their condition as to being capped or cap leaking prior to that time. That the large bottle was capped when it was handed to him. That there was also a new cork in it.

On re-direct examination witness testified over objections and exceptions of Defendants that there was some force or [fol. 64] pressure on the bottle at the time he removed the cap on May 18th. That that indicated to his mind that the bottle had never been opened before since it was capped in the factory. That a bottle similar to this, assuming there was a slight leak, and that there was some yeast fermentation added, would cause the alcoholic content to increase and that when he answered Mr. Baxter's question that it would increase from less than one-half of one per cent of alcohol by volume to eleven per cent, he assumed that the bottle had been opened and a yeast fermentation added.

The Defendants then rested.

The Defendants, by their counsel, then moved to direct a verdict of not guilty on Count I of the Indictment, Conspiracy, as to each of the Defendants, upon the grounds that there was not any evidence or not sufficient evidence to warrant the jury in finding a verdict of guilty on said count, aginst either of said Defendants: that all of the evidence had been illegally obtained by means of the false arrest and the unwaranted and unlawful search and seizure of Defendants' property, in violation of their constitutional rights, as guaranteed by the Fourth, Fifth and Sixth Amendments to the Constitution of the United States. But

the Court denied the motion, to which ruling of the Court the Defendants, by their counsel, then and there duly excepted.

The Defendants then moved to direct a verdict of not [fol. 65] guilty on Count II of the Indictment, smuggling, as to each of the Defendants, on the grounds that there was not any evidence or not sufficient evidence to warrant the jury in finding a verdict of guilty on said count against either of these Defendants. The Court thereupon granted said motion and dismissed Count II of the Indictment.

The Defendants then moved to direct a verdict of not guilty on Count III of the Indictment, Possession, as to each of the Defendants, upon the grounds that there was not any evidence or not sufficient evidence to warrant the jury in finding a verdict of guilty on said count, against either of said Defendants; that all of the evidence had been illegally obtained by means of the false arrest and the unwarranted and unlawful search and seizure of Defendants' property, in violation of their constitutional rights, as guaranteed by the Fourth, Fifth and Sixth Amendments to the Constitution of the United States; and that the law under which this count was found was unconstitutional, because neither the Eighteenth Amendment nor any other part of the Constitution of the United States authorized to Congress nor delegated to the United States the power to pass such a law, nor did the Constitution prohibit to the States the power to pass such a law; therefore such power is reversed under the Tenth Amendmento to the Constitution of the United States to the States respectively, or to the People; but the Court denied the motion, to which rulings of the Court, the Defendants, by their counsel, then [fol. 66] and there duly excepted.

The Defendants then moved to direct a verdict of not guilty on Count IV of the Indictment, transportation, as to each of the Defendants, upon the grounds that there was not any evidence or not sufficient evidence to warrant the jury in finding a verdict of guilty on said count, against either of said Defendants; that all of the evidence had been illegally obtained by means of the false arrest and the unwarranted and unlawful search and seizure of Defendants' property, in violation of their constitutional rights as guaranteed by the Fourth, Fifth and Sixth Amendments to the

Constitution of the United States; but the Court denied the motion, to which ruling of the Court the Defendants, by their counsel, then and there duly excepted.

Counsel for the Defendants then summed up the case for the Defense.

The Assistant United States Attorney summed up the case for the Government.

The Court then charged the Jury as follows:

"Gentlemen of the Jury: These two Defendants are on trial before you on an indictment charging offenses against the laws of the United States. There are three of the four charges now remaining, the fourth having been dismissed by the Court; and I may say that because motions of the Defendants have been denied it should not indicate to you, and you are not to take from that that the Court thinks the Defendants are guilty or not guilty. It only means that it is a question for the Jury. It is never a question for the [fol. 67] Court to decide, unless there is no evidence. The Court held, with reference to the importation charge, that there was not sufficient evidence as to that count to warrant the jury in passing on it. The fact that the Court has denied the motions as to the other counts is not to be taken by you as indicating that the Court has any belief upon the guilt or innocence of the Defendants as to the other three counts. It only means that, in the view of the Court, there is evidence that the jury must pass on and decide the question as to the guilt or innocence of the Defendants; for you, the jury, are the judges of the facts. The Court does not judge the facts. The Court determines the law, and the jury are the sole and exclusive judges of the facts.

"I may say also at the outset that there is no question for you to decide here as to whether these Defendants were lawfully stopped and apprehended and arrested and their automobile and its contents seized. That is a question of law which the Courts, supposedly trained in the law, are called upon to decide. It is not a question of any kind for the jury.

"So there is no such question in this case for you to decide and you are to give no consideration whatever as to whether or not any constitutional or other rights of the

Defendants have been violated in this case. Under the circumstances of this case, such a question is not in the case for you, and you are to decide only whether or not the De- [fol. 68] fendants are guilty of any or all of the three charges in this case. Those three charges are conspiracy, possession and transportation, and there is nothing in the case for you to pass on as to whether or not any rights of the Defendants have been violated.

"Now, the charge of conspiracy is that these two Defendants, with themselves or with others, conspired to violate certain laws of the United States, namely, the customs laws and the prohibition laws, by bringing into the United States and by possessing and transporting in the United States certain intoxicating liquors. A conspiracy means an agreement, an agreement to violate some law of the United States followed by some act called an overt act in carrying out the conspiracy. The agreement alone, without any act carrying it out, is not sufficient. There must be some act done by the so-called conspirators before a conspiracy has been established under the law.

"It is not necessary, in order to establish a conspiracy, that the government produce evidence of any of the alleged conspirators as to the terms of the agreement. It is not necessary that there be any ear witnesses of any agreement. It is not necessary that any document be produced containing the terms of the agreement.

"You will readily understand that if persons, not being these Defendants, but any persons, are about to violate the law and make some agreement to that effect, they desire it [fol. 69] kept a secret. They take care that no one overhears them. They put nothing in writing and they endeavor to keep everything as secret as may be, and so it is not necessary that an agreement to violate the law should be established by any such evidence as would be necessary to establish an ordinary contract in a civil action.

"If the Government has proved facts and circumstances and acts which convince you beyond a reasonable doubt that there was and must have been an agreement, why then the government has proved its charge of conspiracy as fully and as completely as if it had proved by one of the alleged conspirators the terms of the agreement.

"I may, perhaps, illustrate to you how an agreement may be inferred from the acts of the conspirators, or the per-

sons so charged, and this illustration I propose to give you, of course, has no relation to the Defendants. It is simply to illustrate that you do not need to have any proof of the terms of the agreement to find that there was an agreement, that if from the acts and facts and circumstances you can determine that there must have been an agreement then it is as fully and completely proved as if the actual terms of the agreement were proved by one who took part therein.

"This illustration is this: Suppose this were a country in which duelling was the custom, where men fought duels [fol. 70] on points of honor or otherwise, and suppose at daybreak on some morning you saw two men enter a forest, one carrying a sword and another carrying what looked like a physician's bag; that they went through the forest until they came to a clear space in the middle thereof, and then you saw two men approaching from the opposite side of the forest, one likewise with a sword and the other likewise with a bag that looked like a physician's bag; that you saw them meet in the center of this clear space, that the two men with the swords shook hands with each other, drew their swords from their scabbards, paced off a certain distance, turned and faced each other and began to fight with the swords, while the men with the bags stood a short distance away. You would not need any more than that to know that there had been an agreement made that these men would meet at this particular hour and this particular place to fight a duel. You would not need any one to tell you that they heard the agreement; you would not need to have any one submit to you any agreement in writing.

"Now, this has absolutely no application of any kind to the case at bar. It is only for the purpose of illustrating to you by as simple and as forceful an illustration as I can think of that you may determine that there was an agreement from the subsequent acts and facts and circumstances.

[fol. 71] "Now, returning to the charge here, the government says that there was an agreement between these two persons that they would go North into Canada or near Canada, and obtain intoxicating liquors and transport them into and through the Northern part of the State of New York. The government has produced no one who heard an agreement, it has produced no one who saw any docu-

ment in writing, but the government says that it has shown to you two men who live in the central part of the State, in the city of Utica, some long distance away from their homes near the Canadian border on a road which leads from a place called Hogansburg, which, according to the evidence is about a mile or a mile and a half from the Canadian border, this road leading westerly from Hogansburg to a place called Massena; that they were in a car the springs of which sagged down; that in the village of Massena they stopped in front of a garage. One man got out and ran or walked, I do not recall the evidence as to which he did, but he went into the garage, and the other man remained in the car. That the two State Troopers who had been following them for some distance arrived at about the same time, or very close behind them, as I recall. That one State Trooper ran after the man who went toward the garage, and that the other talked to the man remaining in the car. As I recall it, the man who remained in the car was Gambino. Am I right?

[fol. 72] "Gambino, the defendant, who remained in the car, is the stouter one of the two defendants, the one who sits with his back to the jury, and the man who ran to the garage or walked to the garage, whichever it was, is Lima, the younger, apparently younger, and slighter man, who sits between Gambino and the counsel for both of the defendants. That some conversation occurred between the one officer and Gambino who remained in the car. The officer asked Gambino what he had on and he was told to find out, that he shook the car to discover; that he heard the rattle of bottles; and that the other defendant was brought back; that he asked for the key of the car and none was given to him; that he was told to find out; that the key was subsequently found in a pocket of the car; that the car was a closed car, called a roadster; that they opened a compartment in the rear of the car and one back of the seat and they found three hundred and thirty-six bottles, amounting to about thirteen cases as I recall the evidence; that the defendants were then taken over to the police headquarters in Massena and placed under arrest. Some of the bottles were delivered to the customs authorities and thereafter analyzed and the contents appeared to be intoxicating

liquor by the analysis made of part of it at this time and part of it some weeks after the time of the seizure.

"The government says by that proof it has established [fol. 73] that these men were there by agreement, that they went up there to get a load of Canadian ale or other intoxicants and were in the very act of transporting it and carrying out that agreement when they were apprehended and arrested by these State Troopers who have been produced as witnesses here before you; that they could not have been there except by that; that it could not be by a coincidence that two men from Utica could be up there in a car so near the Canadian line, driving from one place near the Canadian line on the way back towards Utica, each with a revolver loaded; that it could not be a coincidence, that it must have been pursuant to an agreement.

"If you are satisfied beyond a reasonable doubt that there was an agreement and that these men were there by this agreement and that they were doing something in carrying out that agreement, why, then, you may find them guilty of conspiracy.

"The Defendants contend that the evidence does not warrant any such inference. The Defendants say there were no bottles visible, that there is nothing to indicate that the one Defendant, Lima, had any knowledge that there were any bottles there, and had no knowledge that any law was being violated; that the evidence does not show but that he was a passenger; that he was there by accident, or that he was there without any reference to any crime and [fol. 74] not in carrying out any agreement, and that he was there and that he was in the car an entirely innocent man and in utter ignorance of the fact that any law was being violated, or that there were any intoxicating liquors in the car.

"If that be so, then, as far as the Defendant Lima is concerned, he is not guilty of conspiracy, he is not guilty of any other offense if he was in entire innocence of the fact that there was anything unlawful in that car or that any crime was being committed, or that any conspiracy had been made.

"The charge of conspiracy here is not limited to an agreement between these two Defendants. Whether or not Lima was a participant in any conspiracy, if Gambino was

transporting Canadian ale or any other intoxicating liquors, he must have obtained them from someone else, unless he manufactured them himself, and if he manufactured them himself, it is a reasonable inference that he procured the materials from someone else, but disregarding the questions of materials and manufacture, he lives in Utica, he had a considerable quantity, he was near the Canadian line, if you can say that, regardless of Lima, he must have obtained this from some other person and did not manufacture them himself without the assistance of any other person, if you are satisfied beyond a reasonable doubt that he did co-operate with some other person, either Lima or someone else, if you are so satisfied beyond a rea- [fol. 75] sonable doubt, you may find him guilty of conspiracy on either one of two theories, that he and Lima made an agreement between themselves, with or without anyone else, and they were there in the act of carrying it out, or if Lima was innocent that Gambino had agreed with some other person to procure for him or get for him to sell to him intoxicating liquors, and that that had been done and he was in the act of transporting it to another place, if you are so satisfied beyond a reasonable doubt, why, then, Gambino is guilty of conspiracy whether Lima is or not.

"I will come now to the question of possession and transportation. If you are satisfied beyond a reasonable doubt that there were intoxicating liquors in that car and that Gambino and Lima knew there were intoxicating liquors in that car, then they are guilty of possession, unless they have shown you that they obtained them lawfully, without violating the prohibition law. They have made no effort to show you that they obtained them lawfully. The proof is wholly that of the government. So, if you are satisfied beyond a reasonable doubt that there were intoxicating liquors in that car and Gambino and Lima knew they were in the car, then they are guilty of possession. If only one knew it, why, then, the one who knew it is guilty of possession. If neither of them knew it and they were both innocent of any knowledge of the contents of the car, then neither of [fol. 76] them is guilty.

"Transportation is like possession. If there were intoxicating liquors in that car and if Gambino and Lima were consciously and knowingly transporting them and you are

satisfied of both of those facts by evidence which convinces you beyond a reasonable doubt, then they are both guilty. If one consciously and knowingly did it and the other was in utter ignorance, why, then the one and only the one who consciously and knowingly did it is guilty.

"The fact that the Defendants have not taken the witness stand in this case is not to be taken by you as any indication of any kind that they are guilty of anything nor taken by you as in any way adverse to them. It is a right which the law gives and the courts are bound to protect on the part of any such man charged with crime, to require the government, or the People in the State court, to prove its claim, and the Defendant may elect not to take the stand and nothing adverse to the Defendant, no inference, no deduction, nothing in anywise adverse to the Defendant may be drawn therefrom.

"This is a criminal case and the burden of proving the guilt of the Defendant beyond a reasonable doubt rests upon the government. The presumption of innocence in a criminal case is in favor of the Defendant and mere preponderance of the evidence is not sufficient to justify a verdict [fol. 77] of guilty in a criminal case. The burden of proof is upon the Prosecution and it must prove every material fact and establish the guilt of the Defendants to your satisfaction beyond a reasonable doubt. The degree of satisfaction and certainty required is not absolute conviction or certainty, but the evidence must produce that effect on the minds of the individual jurors so that after its consideration each juror can, in view of his oath, have no reasonable doubt of the guilt of the accused. By reasonable doubt I mean a doubt arising out of the evidence and not an imaginary doubt, a fanciful conjecture or a strained inference, but such a doubt as a reasonable man would act upon or decline to act upon when his own concerns are involved, a doubt for which a good reason can be given, which reason must be based on the evidence or want of evidence. Where such a doubt exists, the accused is entitled to its benefit and should be acquitted; but where the evidence is satisfactory to an impartial mind that the crime was committed and that the Defendant committed it as charged, when the mind comes naturally and reasonably

to such a conclusion from a fair consideration of the evidence, then there can be no reasonable doubt and the prisoner should be convicted; and, of course, that applies to each one separately and to both together. That is to say, wherever more than one is concerned, it applies to both, and otherwise it applies to each one separately; and you [fol. 78] must decide this case with reference to these two defendants as if each were on trial separately. You must view each Defendant's case by itself in arriving at your verdict.

"So, take this case, gentlemen, and decide it. You may find the Defendants guilty or not guilty of each of the offenses, or of some of them and not the others, or of none of the offenses or of all. You may find one guilty and the other not guilty, if you so decide, and you may find them both not guilty or both guilty."

The Defendants, by their counsel, then and there, and before the Jury retired, excepted to the following parts of the Court's charges:

"If you are satisfied beyond a reasonable doubt that there was an agreement and that these men were there by this agreement and that they were doing something in carrying out that agreement, why, then, you may find them guilty of conspiracy."

"If that be so, then, as far as the Defendant Lima is concerned, he is not guilty of conspiracy, he is not guilty of any other offense, if he was in entire innocence of the fact that there was anything unlawful in that car or that any crime was being committed, or that any conspiracy had been made."

"So, if you are satisfied beyond a reasonable doubt that [fol. 79] there were intoxicating liquors in that car and Gambino and Lima knew they were in the car, then they are guilty of possession. If only one knew it, why, then, the one who knew it is guilty of possession. If neither of them knew it and they were both innocent of any knowledge of the contents of the car, then neither of them — guilty."

"If the jury are satisfied by evidence which convinces them beyond a reasonable doubt that these two Defendants or either of them had in their possession intoxicating liquor,

and knew that it was intoxicating liquor, that warrants a verdict of guilty."

Thereupon, Counsel for the Defendants, and before the Jury retired, requested the Court to charge as follows:

That before one or both of the Defendants could be found guilty of conspiracy, there must be proof beyond a reasonable doubt that these two Defendants or whichever one was found guilty made a distinct and definite agreement of conspiracy within the Northern District of New York.

The Court then charged:

"Yes, of course, the agreement must have been made within the Northern District of New York, but the Northern District of New York, gentlemen, does not mean St. Lawrence and Franklin Counties. Utica, Albany, Auburn, Binghamton, Syracuse are all in the Northern District of New York, and it numbers twenty-nine counties and all the eastern end of the State."

[fol. 80] Thereupon Counsel for the Defendants requested the Court to charge the jury as follows: That the mere fact that these Defendants were together at the time of the arrest and seizure, does not warrant an inference that a conspiracy had been made within the Northern District of New York. That it needs some further proof than that to justify such a verdict.

Thereupon the Court charged the Jury as follows:

"I charge you, Gentlemen, that the mere fact that two men are together does not of itself prove any conspiracy. You must find it from other evidence in the case, together with the fact that they are together, which must convince you beyond a reasonable doubt that there was a conspiracy, before you can find them guilty of such."

Thereupon, Counsel for the Defendants requested the Court to charge the Jury as follows: That there is no duty upon the part of these Defendants or either of them to show anything; that there is no condition created by any of the evidence which here changes the burden of proof or puts them or either of them, under the duty to answer any suggestions in order to establish their innocence.

Thereupon the Court charged the Jury as follows:

"That is true of the charges of conspiracy and transportation, but it is not true of the charge of possession, and, on the contrary I charge and find it necessary to repeat, if the Jury are satisfied by evidence which convince them beyond a reasonabe doubt that these two Defendants or either of them had in their possession intoxicating liquor and knew [fol. 81] it was intoxicating liquor, that warrants a verdict of guilty, unless such Defendant or Defendants has or have satisfied the jury that they did not obtain it unlawfully or that he or they obtained it lawfully, and that no issue of that kind has been made in this case."

The Defendants also then and there, and before the Jury retired, excepted to the ruling of the Court in failing to charge the Jury as above requested by the Defendants.

Whereupon, the Jury retired and brought in a verdict finding both Defendants guilty, as charged in the indictment, on Counts I, III and IV.

The Defendants, by their counsel, then moved the Court to set aside the verdict as being contrary to the evidence, and for a new trial upon all the exceptions taken in the case; but the Court denied the motion, to which ruling of the Court, the Defendants by their Counsel then and there duly excepted.

The Defendants, by their counsel, thereupon moved the Court to arrest the judgment for the purpose of giving the Defendants time to sue out a writ of error, and the Court did so arrest judgment, until the 27th day of May, 1925; at which time the Defendants, by their counsel, moved the Court to set aside the verdict of Guilty on the Count of Conspiracy, against each of the Defendants, on the grounds that the indictment charged that conspiracy was committed in the County of St. Lawrence, and there was no proof as [fol. 82] to where or when a conspiracy was committed, even though there might be some evidence that there had been some conspiracy. But the Court denied the motion, to which ruling of the Court, the Defendants, by their counsel, then and there duly excepted.

Thereupon the Court pronounced judgment upon the verdict and sentenced the Defendants as follows:

"The sentence and judgment of the Court is that each of these Defendants be confined in the United States Peni-

tentiary at Atlanta, Georgia, for one year and one day and that they be fined in addition thereto the sum of ten thousand dollars each. Now, if they have any property I would not fine them ten thousand dollars, if they have any property that would prevent them from taking the pauper's oath. That is on the conspiracy charge. Nothing on either of the other two charges. The confinement on account of the fine at the Penitentiary, Atlanta, Georgia, to be after the expiration of the prisoner's sentence, and the Court will grant your writ of error bill and bail is fixed at five thousand dollars each, and as I understand you have bondsmen here."

This is to certify that the foregoing bill of exceptions tendered by the Defendants is correct in every particular and is hereby settled and allowed and made a part of the record in this case.

Done in open Court this 26th day of February, 1925.

Frank Cooper, United States District Judge.
(Seal.)

[fol. 83] In United States District Court

[Title omitted]

Order Extending Time—August ~~18~~, ~~1925~~

This cause coming on further to be heard before this court on the petition of the above named defendants(Rosario Gambino and Joseph Lima, for a writ of error to review the conviction of said defendants herein upon Counts I, III and IV, of the indictment herein; and it appearing to this court that the said defendants have been unable to procure the stenographic record herein so as to specifically set forth assignments of error; but that said defendants have filed assignments of error herein for the consideration of this court on said application; and a writ of error having [fol. 84] been allowed and filed herein; and due deliberation having been had thereon:

Now, on motion of I. K. Baxter, attorney for said defendants Rosario Gambino and Joseph Lima, it is hereby—

Ordered, That the May, 1925, term of this court be ex-

tended thirty days from the date hereof for the purpose of signing and settling the bill of exceptions to be signed and settled and filed herein, and for all other purposes; and it is further—

Ordered, That the United States of America, complainant herein, be granted an extension of time to be and appear at the United States Circuit Court of Appeals for the Second Circuit at the City of New York, N. Y., of thirty days from the date hereof.

Frank Cooper, United States District Judge.

In United States Circuit Court of Appeals, Second Circuit

[Title omitted]

[fol. 85] Stipulation re Extension of Time—September 16, 1925

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the time within which to docket the above case and file the record thereof with the Clerk of the United States Circuit Court of Appeals, for the Second Circuit, and for the United States Court Clerk of this District, to make return to the citation herein, be further extended to and including the 30th day of December, 1925, and the attorneys for the respective parties hereto hereby waive notice of application for such extension, required by Rule 14 of the Rules of Practice of the said United States Circuit Court of Appeals, Second Circuit, and hereby consent to the making and entry of an order herein granting the extension aforesaid for the purposes mentioned.

Dated September 16th, 1925.

I. K. Baxter, Attorney for Plaintiff-in-Error. Leo Bresel, Attorney for Defendant-in-Error and Assistant United States Attorney.

[fol. 86] In United States Circuit Court of Appeals, Second Circuit

[Title omitted]

Order Extending Time—September 16, 1925

This matter coming on further to be heard before the Honorable Frank Cooper, United States District Court Judge, in and for the Northern District of New York, and upon the stipulation of the attorneys for the respective parties in the above entitled action dated September 16th, 1925, and due deliberation having been had thereon, it is hereby

Ordered, That the May, 1925, term of this court be further extended to and including the 30th day of December, 1925; and the time to docket the above case and file the record thereof with the clerk of the United States Circuit Court of Appeals, Second Circuit, and for the clerk of the United States District Court, to make return to the citation [fol. 87] herein, be and the same hereby is extended to and including the 30th day of December, 1925.

Dated September 16th, 1925.

Frank Cooper, United States District Judge, Northern District of New York.

In United States Circuit Court of Appeals, Second Circuit

[Title omitted]

Stipulation re Extension of Time—December 29, 1925

It is hereby stipulated and agreed, by and between the attorneys for the respective parties hereto, that the time within which to docket the above case and file the record thereof with the Clerk of the United States Circuit Court of Appeals, for the Second Circuit, and for the United States Court Clerk of this District, to make return to the [fol. 88] citation herein, be further extended to and includ-

ing the 1st day of August, 1926, and the attorneys for the respective parties hereto hereby waive notice of the application for such extension required by Rule 14 of the Rules of Practice of the said United States Circuit Court of Appeals, Second Circuit, and hereby consent to the making and entry of an order herein granting the extension aforesaid for the purposes mentioned.

I. K. Baxter, Attorney for Plaintiff-in-Error. Leo Breed, Assistant United States Attorney and Attorney for Defendant-in-Error.

In United States Circuit Court of Appeals, Second Circuit

[Title omitted]

Order Extending Time—December 29, 1925

[fol. 89] This matter coming on further to be heard before the Honorable Frank Cooper, United States District Court Judge, in and for the Northern District of New York, and upon the stipulation of the attorneys for the respective parties in the above entitled action, dated December 29, 1925, and due deliberation having been had thereon, it is hereby

Ordered, That the May, 1925, term of this Court be further extended to and including the 1st day of August, 1926; and the time to docket the above case and file the record thereof with the Clerk of the United States Circuit Court of Appeals, Second Circuit, and for the Clerk of the United States District Court, to make return to the citation herein, be and the same hereby is extended to and including the 1st day of August, 1926.

Frank Cooper, United States District Judge, Northern District of New York.

[fol. 90] IN UNITED STATES DISTRICT COURT

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby stipulated between the parties that the foregoing record is the record on writ of error herein and further comparison by the Clerk be dispensed with.

Dated July 14th, 1926.

Irving K. Baxter, Attorney for Plaintiff-in-Error.
Oliver D. Burden, United States Attorney and Attorney for Defendant-in-Error.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 91] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

ROSARIO GAMBINO and JOSEPH LIMA, Plaintiffs in Error,

v.

UNITED STATES, Defendant in Error

Before Martin T. Manton and Learned Hand, Circuit Judges, and Augustus N. Hand, District Judge

OPINION—Filed January 21, 1927

PER CURIAM:

Judgment of conviction affirmed.

[fol. 92] In United States Circuit Court of Appeals, Second Circuit

[Title omitted]

Error to the District Court of the United States for the Northern District of New York

Decree—Filed January 28, 1927

This cause came on to be heard on the transcript of record from the District Court of the United States for the Northern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

M. T. M., L. H.

[fol. 93] [File endorsement omitted.]

[fol. 94] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 95] Supreme Court of the United States

Order Allowing Certiorari—Filed May 31, 1927

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

That there is not and was not at any of the times herein mentioned a State prohibition law in New York State. That New York State troopers have been and are actively engaged, under orders of the Governor of the State, in aiding to enforce the National Prohibition Act, as part of their official duties, and under authority granted to them "or any officer of the law" by Section 26 of Title II of said act. That said State troopers have been advised by, and customarily follow instructions by, Federal officers as to how to proceed in prohibition cases; and have a general understanding and arrangement with said Federal officers, whereby said State troopers customarily turn the property seized and the persons arrested over to Federal authorities. That a part of their instructions are that they do not need any search warrants. Thus, while claiming to act officially as authorized Federal agents in the enforcement of Federal law, they claim also the right to search and seize *ad libitum*, without being subject to the restraining influence of the Federal Constitution, because they are also State officers.

That on October 1, 1924, at 1 p. m., petitioners were riding southward toward Massena, N. Y., on the State highway in a Buick roadster, owned and driven by said petitioner Gambino. That they stopped in front of the Reno Garage at Massena, N. Y., so that petitioner Lima might go to the men's room. That immediately thereafter State troopers Carroll and Travis came up in a Ford car and demanded that petitioner Gambino open the rear compartment of his car, so that same might be searched by said officers of the law. The de-

mand was refused, and said State troopers thereupon falsely arrested both of the petitioners, and seized said car, without any warrant, and upon mere suspicion that the same might be carrying intoxicating liquor, in violation of the National Prohibition Act. That said troopers took petitioners and said car to the police station at Massena. That said officers then opened the rear compartment of said car, and claimed to have found therein 14 cases of Canadian ale. They also searched the persons of petitioners and found on each a loaded revolver, together with a lawful permit to possess and carry same. Said troopers then turned over the property seized, and the men arrested, to Federal agent Robillard. That petitioners were then taken before a local U. S. Commissioner, and arraigned upon the charges of illegally possessing and transporting intoxicating liquor, to wit: the alleged Canadian ale found in the Buick car, as aforesaid.

At the October term of the U. S. District Court for the Northern District of New York petitioners moved for the return of the property unlawfully seized, and to restrain the use of evidence unlawfully obtained by said State troopers, through the false arrest of the petitioners, and the illegal search and seizure, as aforesaid. The motions were denied, and the petitioners were arraigned and pleaded not guilty before the court upon the charges, as aforesaid.

The petitioners were rearraigned on said charges several times, and urged by the prosecuting attorney and prohibition agents to have one of them at least

ing to act in their official capacity for the purpose of enforcing the Volstead Act, are justified in making unwarranted searches and seizures upon mere suspicion, or whether they must have probable cause for believing that the law is being violated; the question whether citizens may be lawfully convicted of constructive crimes; whether they may be so convicted solely on evidence which is equally consistent with the theory of innocence as with the theory of guilt; and whether citizens must either defend their constitutional rights against unwarranted search, seizure and arrest by officers of the law, with force and arms, or else abandon them.

The grounds upon which it is insisted that the judgment of the circuit court of appeals should be reversed are: That the said court has here decided important questions of Federal law in a way probably untenable, in conflict with the weight of authority, and in conflict with applicable decisions of this Court; because—

(*a*) Said officers of the law were authorized by Section 26 of Title II of the National Prohibition Act to act as Federal agents in making such search, seizure and arrest in proper cases, and were acting under color of such authority solely for the purpose of enforcing Federal law in the instant case.

(*b*) While acting as Government agents in the enforcement of Federal law, without any warrant or authority in law, without probable cause, and upon mere suspicion, they made the

said search, seizure and arrest, in violation of defendant's constitutional rights, as aforesaid.

(*c*) There is not any evidence to support the conviction of conspiracy, except such as might be constructed from evidence which was equally as consistent with the theory of innocence as with the theory of guilt.

as more fully appears in petitioners' brief hereto annexed.

Your petitioners believe that the aforesaid judgment of the circuit court of appeals is erroneous, and that this honorable Court should require the said case to be certified to it for its review and determination, in conformity with the provisions of the Act of Congress in such cases made and provided.

Wherefore your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said circuit court of appeals in the said case therein, entitled Rosario Gambino and Joseph Lima, plaintiffs in error, *vs.* United States of America, defendant in error, No. 9229, to the end that the said case may be reviewed and determined by this Court, as provided in Judicial Code, Sec. 240, or that your peti-

tioners may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said act, and that the said judgment of the said circuit court of appeals in the said case, and every part thereof, may be reversed by this honorable Court.

And thus your petitioners will ever pray.

ROSARIO GAMBINO,
JOSEPH LIMA,
Petitioners.
IRVING K. BAXTER,
Attorney for Petitioners.

There was no formal opinion written by the trial judge.

The preliminary motions and trial were before the Honorable Frank Cooper, judge of the United States District Court for the Northern District of New York. He announced orally that there seemed to be "reasonable grounds of suspicion" on the part of the State troopers.

This announcement does not appear in the printed record. However, on page 30 of the printed record, in overruling an objection to some evidence by the defendants, the court said,

> "It is admissible, not as to whether or not the defendants committed any of the crimes. As to those things, it is not competent and material at all, but it has a bearing on whether or not they had reasonable grounds to suspect that the automobile contained intoxicating liquors. So, on that ground and on that ground alone, the jury will understand the objection is overruled."

Judgment to be Reviewed.

Motion for return of property and to quash evidence (R., 24 and 26).

Motion denied (R., 26).

Motion to direct a verdict of not guilty on each of the counts, on the grounds that there was no legal evidence upon which a verdict of guilty might properly be based, because all of the evidence offered had been obtained by means of the false arrest and unlawful search and seizure, in violation of the Fourth and

SUBJECT INDEX.

	Page
Petition for writ of certiorari	1
Opinion of the court	9
Judgment to be reviewed	9
Claims and rulings	10
Statutory provisions as to jurisdiction	14
Cases to sustain jurisdiction	15
Statement of the case	15
Specification of assigned errors	23
Summary of argument	26
Argument	28
Point I. New York State troopers, as officers of the law, are authorized and directed to enforce the National Prohibition Act by Section 26 of Title II of said act in the same manner and to the same extent as officers paid by the Federal Government	28
Point II. This arrest, search, and seizure were made for the purpose and with the intent of enforcing the National Prohibition Act	29
Point III. This false arrest and illegal search and seizure were made without warrant or authority in law, without probable cause, and upon mere suspicion, by authorized agents of the Federal Government, for the purpose of enforcing Federal law	34
Point IV. The restrictions of the Fourth and Fifth Amendments to the Constitution of the United States apply to any exercise of the power of the Government through any of its authorized agencies.	37
Point V. There was not any evidence in the case to support the conspiracy charge	45

Table of Cases Cited.

On Argument.

Adams v. New York, 192 U. S., 585	39
Boyd v. United States, 116 U. S., 616	38
Carroll v. United States, 45 S. Ct., 280	42

Page

Davidson et al. v. United States, 247 Fed., 285 47
Gouled v. United States, 255 U. S., 298 41
Stafford et al. v. United States, 300 Fed., 537 48
United States v. Story, C. C. A., 5th Circuit, 294 Fed., 517 28
Weeks v. United States, 232 U. S., 383 33
Winsor v. United States, 286 Fed., 51 ..... 47, 49

On Jurisdiction.

Cameron v. United States, 231 U. S., 710 15
Mecanno, Limited, v. John Wanamaker, N. Y., 253 U. S., 136 .. 15

STATUTES CITED.

Judicial Code of U. S., Sec. 240 (a) 14
National Prohibition Act, Title II, Secs. 2 and 26 28
Revised Statutes of U. S., Sec. 1014 29

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No.

ROSARIO GAMBINO AND JOSEPH LIMA,
PETITIONERS,

vs.

THE UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Rosario Gambino and Joseph Lima, respectfully represent that they are citizens of the United States, residing in the city of Utica, N. Y., and are the plaintiffs in error in the above-entitled matter.

plead guilty to said charges, but each steadfastly declined to so do.

The cause was moved for trial before the district court, at a stated term, held in the city of Syracuse, N. Y., on the 15th day of May, 1925. The petitioners again moved to restrain the use of evidence unlawfully obtained, as aforesaid, and for the return of the property unlawfully seized. The motions were again denied, and the case ordered to proceed to trial. The prosecuting attorney then announced that an indictment had been found against petitioners charging them: First, with conspiracy to violate the National Prohibition Act, and the customs laws of the United States, by unlawfully possessing and transporting and bringing into the United States said alleged intoxicating liquor; Second, with smuggling, by bringing in said alleged Canadian ale from Canada; Third, with illegally possessing said alleged intoxicating liquor, and Fourth, with illegally transporting same. The arraignment of petitioners on said indictment was waived or conceded. The only evidence offered was that which had been procured through the unlawful arrest, search and seizure, as aforesaid; and the same was admitted over objection and exception of petitioners that it had been obtained by officers of the law while acting for the purpose of enforcing the National Prohibition Act, in their official capacity, but without warrant or authority in law, and in violation of petitioners' constitutional rights, as guaranteed by the Fourth and Fifth Amendments to the Constitution of

the United States. The trial court dismissed the second count, smuggling. The jury rendered a verdict of guilty on the others, and the court sentenced petitioners on the 27th day of May, 1925, to be confined in the Federal prison at Atlanta for one year and one day each, and to pay a fine of $10,000 each on the conspiracy charge, and nothing on either of the other charges.

The case was reviewed on writ of error by the Circuit Court of Appeals for the Second Circuit, and judgment of the district court was affirmed without opinion on the 21st day of January, 1927 (R., 91). Yet it was urged by the plaintiff in error that these acts of these officers of the law were admittedly not their individual misconduct, nor incidental to some other or lawful procedure, but were official acts of authorized agents of the Federal Government, for the avowed purpose of enforcing Federal law; and that the constitutional restrictions therefore do apply. That admittedly there were no facts or circumstances known to the seizing officers to constitute probable cause for making this unwarranted seizure. That the most that had been claimed, in the attempted justification before the trial court, was that they had reasonable grounds to suspect that the automobile contained intoxicating liquor.

The questions represented by the assignments of error in this cause are of broad general interest to officers of the law and to the people. They involve the right of State officers to arrest, search, or seize for violation of the National Prohibition Act in any case. The question as to whether officers of the law, purport-

Fifth Amendments to the Constitution. Motion granted as to Count 2, smuggling. Other motions denied (R., 64-66).

Jury rendered verdict of guilty as charged against both petitioners on Counts 1, 3, and 4 (R., 81). The court then pronounced judgment as follows:

> "The sentence and judgment of the court is that each of these defendants be confined in the United States Penitentiary at Atlanta, Georgia, for one year and one day, and that they be fined in addition thereto the sum of $10,000 each. Now, if they have any property I would not fine them $10,000, if they have any property that would prevent them from taking the pauper's oath. That is on the conspiracy charge. Nothing on either of the other two charges. The confinement on account of the fine at the penitentiary, Atlanta, Georgia, to be after the expiration of the prisoners' sentence, and the court will grant your writ of error bill, and bail is fixed at $5,000 each, and, as I understand, you have bondsmen here" (R., 82).

"Per Curiam:

"Judgment of conviction affirmed" (R., 91).

Judgment of the United States Circuit Court of Appeals for the Second Circuit. Filed January 21, 1927 (R., 91).

Claims and Rulings.

On their preliminary motions petitioners claimed that the acts of the State troopers in making this false arrest and the unwarranted and unlawful search and

seizure for violation of the Volstead Act must be deemed to be the acts of Federal agents. That, therefore, the search and seizure by said State policemen, without any warrant or authority in law, came under the prohibitions of the Fourth and Fifth Amendments to the Constitution of the United States. That the property seized should be ordered returned, and the evidence so obtained should be quashed (R., 24-25). The trial court denied the motions, holding substantially that the arrest and the subsequent search and seizure were justified because the officers had "reasonable grounds for suspicion."

The evidence unlawfully obtained, as aforesaid, was used on the trial, and the convictions based thereon, over appropriate objections and exceptions.

At the review on writ of error by the circuit court of appeals, petitioners claimed in printed brief and oral argument—

That State officers are authorized to enforce Federal law by Section 1014, R. S. of U. S.

That any officer of the law is authorized and directed to enforce the Volstead Act, by Section 26 of Title II of said act.

That these officers of the law admittedly acted solely for the purpose of enforcing the Volstead Act, by order of their superior officers, and followed literally the directions of said act, instantly after making the unlawful search.

That they acted as per instructions on how to proceed in Volstead cases received from Federal prohibi-

tion enforcement headquarters, and under a general prearrangement between State authorities and Federal authorities, whereby New York State troopers customarily participated in the enforcement of the Volstead Act as part of their official duties.

Some of the judges announced orally that that court had decided in Schroeder *vs.* U. S., 7 Fed. Rept. (2d), 60, that the constitutional amendments were not applicable to searches by State officers, and that, therefore, the question was no longer open.

In reply it was claimed that in the case at bar the State officers both claimed to, and did, act under Federal authority such as would make the amendments applicable; and the Schroeder case, *supra*, was clearly distinguished. Applicable decisions of the United States Supreme Court were cited in support of the claim; none were cited against it. The United States Attorney for the Northern District of New York stated that his office considered it a mooted question, which they would like to have settled. That the petitioners were falsely arrested upon mere suspicion, and falsely imprisoned in the Massena jail. That the automobile was then opened and searched, and the persons of petitioners searched, in violation of their constitutional rights, to be secure against unreasonable searches and seizures, to not be deprived of their liberty or property without due process of law, and to not be compelled to give evidence against themselves. That substantially all of the evidence presented at the trial had been thus obtained, and that such evidence could not lawfully be

used against the petitioners or either of them in criminal prosecution.

That there was not any evidence to support the charge of conspiracy. That no claim was made at the trial that either of petitioners attempted to escape. That, while one of the arresting officers testified that petitioner Lima ran into the garage, yet the other officer testified that he walked into same. That the actual testimony at the trial showed that he had gone into the men's room. That the officer who followed him in had no difficulty in finding him, and that there was not any question of any attempt at either resistance or escape.

That neither of petitioners made any admissions of any kind at any time.

That both officers testified that both petitioners protested the entire innocence of petitioner Lima at the time of the arrest.

That the trial court had erred in admitting, as evidence of conspiracy, testimony that one of the petitioners was carrying a revolver, and that the other was carrying a pistol; because each was also carrying a lawful permit, issued by a court of record, to carry same. That the carrying of such arms was therefore lawful procedure, and not evidence of any crime; and that there was not any evidence that either of petitioners had made, or attempted to make, any improper use of such arms.

That, even if the evidence obtained by the unwarranted search and seizure might lawfully be used, it

could only justify the conviction of petitioner Gambino on the possession and transportation counts, he being the owner and driver of the car.

That there was not any evidence of any kind against petitioner Lima of any offense, beyond merely the fact that he was riding in Gambino's car; and that such evidence was consistent with the theory of innocence, as well as with the theory of guilt, and was therefore insufficient as a basis for any verdict against him. That the prosecution had not shown any concert of action in the commission of an unlawful act, or other facts and circumstances from which the natural inference would arise that the unlawful act of transporting was in furtherance of a common design, intent and purpose of the alleged conspirators. That, accordingly, there was not any evidence to support the charge of conspiracy against either of the petitioners.

But the circuit court of appeals, nevertheless, affirmed without opinion.

The jurisdiction of this Court is invoked under the Act of February 13, 1925, Sec. 240(*a*) of the Judicial Code of the United States, which provides:

> "In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by

it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

The following cases are believed to sustain the jurisdiction of this Court:

Cameron *vs.* United States, 231 U. S., 710.

Meccano, Limited, *vs.* John Wanamaker, New York, 253 U. S., 136.

Statement of the Case.

On August 1, 1924, at 1 p. m., the petitioners were riding southward toward Massena, N. Y., on the State highway in a Buick roadster, owned and driven by petitioner Gambino. As they came into Massena they stopped in front of the Reno Garage, owned and operated by N. A. Santamour and at which George Aubrey was employed. Petitioner Lima got out of the car and went into the men's room at said garage. Immediately thereafter New York State Troopers Carroll and Travis came up in a Ford car. Trooper Carroll asked Gambino for his registration card, and was shown same. He then demanded of petitioner Gambino to open the rear compartment of the car. He refused to do so. Said officer then asked Santamour for keys to open said rear compartment, and was told that he did not have any keys for same. Said officer then attempted to question petitioner Gambino as to what was in the rear compartment of his car and petitioner declined to state. The officer was then asked if he had a search warrant, and replied that they did not have any.

Meanwhile, officer Travis had gone into the garage, and came back with petitioner Lima. Petitioner Lima was also questioned as to what was in the rear compartment of said car, and replied that he did not know. Said officers thereupon, and without further ado, falsely arrested both of the petitioners and took them and Gambino's car to the police station at Massena (R., 24, 25, 26).

The petitioners moved on their verified petition and supporting affidavits by N. A. Santamour and George Aubrey, before the United States District Court on the 27th day of October, 1924, for the return of the property unlawfully seized as aforesaid. The said petition and affidavits stated the facts substantially as hereinbefore recited. The petition further alleged that the seized property and the persons of petitioners were turned over by said State officers to Federal officers for prosecution in Federal Court for alleged illegal possession and transportation of intoxicating liquor, to wit: beer. That said Federal officers were proposing to use evidence obtained by means of the said false arrest and illegal search and seizure by said State troopers against these petitioners at the proposed trial in the United States District Court on said charges, and in proceedings to have petitioners' property confiscated (R., 25).

That said false arrest, search and seizure were made by said officers for the purpose of enforcing the National Prohibition Act, under color or authority granted to said officers by Section 26 of Title II of said act. That said false arrest, search and seizure

as aforesaid were made in violation of petitioners' constitutional rights, to be secure from unreasonable searches and seizures, to not be deprived of their liberty or property without due process of law, and to not be compelled to give evidence against themselves, as guaranteed by the Fourth and Fifth Amendments to the Constitution of the United States. Wherefore petitioners moved for an order directing the return to petitioners of the property unlawfully seized and held from them as aforesaid by said State troopers and said Federal officers, and for an order forbidding and restraining the use of the evidence so obtained against either of the petitioners or their property.

The foregoing preliminary petitions and motions were argued in behalf of the petitioners by S. J. Capecelatro as counsel. No stenographic record was taken of these proceedings. The petitioners were, on various occasions, recalled before the United States District Court and re-arraigned, at which times the prosecuting attorney suggested that a plea of guilty be entered by one at least of petitioners in settlement of the matter; but the petitioners, and each of them, steadfastly declined to plead guilty to any charge. The case was moved for trial on the 15th day of May, 1925, at which time Irving K. Baxter, Esq., appeared as counsel for the petitioners. The defendants again moved to restrain the use of evidence unlawfully obtained as aforesaid, and for the return of property unlawfully seized as aforesaid, upon all the grounds and upon all the papers theretofore offered in support of said motions (R., 26). A copy of an answering

affidavit by J. T. Carroll was then served upon counsel for the defendants, which alleged in substance "that said affiant, J. T. Carroll, New York State policeman, in company with Trooper Travis, were traveling on the highway from Massena, N. Y., to Hogansburg, N. Y., in an automobile on the first day of August, 1924. 'That they met a Buick roadster, which was loaded very heavily. That deponent noticed that the license plates were from a county in the central part of the State. That these facts, together with the fact that the car was heavily loaded and was traveling at a speed of about twenty-five or thirty-five miles per hour, and from his experience which he has had with the activities in transporting intoxicating liquors in the northern part of the State, these facts led him to believe that this was a load of intoxicating liquor. That deponent and Trooper Travis turned around and apprehended the driver and occupant of said Buick roadster. That said Buick roadster was being driven at that time by Rosario Gambino, and the occupant was Joseph Lima. That these two were placed under arrest at this time. Deponent further says that at the time there were no Federal officers present, and that they were not working in conjunction with Federal officers' " (R., 27-28).

The court again denied the motions, ordered a jury drawn, and the case to proceed to trial. The prosecuting attorney then stated that the defendants had been indicted on four counts, to wit: first, Conspiracy to violate the National Prohibition Act and the customs laws of the United States by unlawfully importing

into and transporting through the State and Northern District of New York large quantities of intoxicating liquor. Second, smuggling by bringing in said Canadian ale from Canada to the Northern District of New York unlawfully. Third, illegally possessing said intoxicating liquor. Fourth, illegally transporting said intoxicating liquor. The prosecuting attorney then stated that he was not sure whether or not the defendants had been arraigned and had pleaded to said indictments. Counsel for the defense then stated that the defendants would waive or concede the arraignment on condition that the preliminary motions and procedure were to apply to the indictment and evidence offered thereunder with the same force and effect as to the original information, and the case then proceeded to trial.

To maintain its case the Government offered evidence by Troopers Carroll and Travis substantially as set forth in the answering affidavit of J. T. Carroll, as aforesaid; and same was received over constitutional objections and exceptions, as aforesaid. Trooper Carroll also testified in addition, while on the witness stand, that immediately before making the arrests he lifted the rear end of the defendants' car and let it drop and heard bottles rattle. In this addition this witness was neither corroborated by the other arresting officer, nor even by his own affidavit as offered in opposition to the preliminary motions. Also, the verified petition of the defendants, and the supporting affidavits by N. A. Santamour and George Aubrey, substantially contradicted this testimony.

Trooper Carroll also testified that Gambino asked him if he couldn't fix it up, and he told him "No, of course not" (R., 38). This testimony by Carroll, also, was not corroborated in any way. This witness also testified that the place at which the arrests were made was known to him as Rayno's garage. That Frank Rayno was proprietor of the same, and had the reputation of being a bootlegger (R., 31). In this addition to his testimony this witness was not corroborated in any way, but was flatly contradicted by the affidavits of N. A. Santamour and George Aubrey, showing that the place was known as "the Reno Garage, of which Santamour was the proprietor and said Aubrey was an employee" (R., 25). In overruling the objections of petitioners to this evidence, that same was irrelevant and highly prejudicial to defendants, the court said:

> "It is admissible, not as to whether or not the defendants committed any of the crimes. As to those things, it is not competent and material at all, but it has a bearing on whether or not they had reasonable grounds to suspect that the automobile contained intoxicating liquors. So, on that ground and on that ground alone, the jury will understand the objection is overruled" (R., 30).

It is thus seen that the trial court, in overruling the preliminary motions, erroneously held "that reasonable grounds to suspect" that the automobile contained intoxicating liquor was justification for the false arrest, and the subsequent unwarranted search

and seizure while petitioners were being falsely imprisoned; and that it also erroneously permitted incompetent and highly prejudicial evidence to be heard by the jury, over appropriate objections and exceptions. Each of these errors were assigned and urged as grounds for reversal before the lower court.

Troopers Carrol and Travis further testified that they had seized at the police station a revolver with cartridges from one defendant, and a pistol with cartridges from the other defendant, over objections and exceptions; the trial court ruling "That these things are competent evidence upon one of the charges in the case, namely, the question of conspiracy;" and overruled defendants' objections, to which ruling of the court the defendants, by their counsel, then and there duly excepted (R., 36).

The only further evidence offered by the prosecution was that of the Federal officers who had received the property seized as aforesaid, to wit: the automobile, the 15 cases of alleged beer found therein on search by said State officers at the police station after petitioners had been falsely arrested and while they were being falsely imprisoned; and the firearms seized from the persons of the petitioners as aforesaid; and there was also offered the testimony of the chemist that he had analized said beer and found the same to contain more than the lawful alcoholic content.

On cross-examination it was shown that, at the time the firearms were seized from the defendants, there were also seized proper permits from courts of record

showing the petitioners were lawfully entitled to carry same.

The prosecution then rested. The defendants offered no evidence and the case was closed.

The defendants moved to direct a verdict of not guilty on each of the four counts of the indictment, on the grounds that the evidence was insufficient to warrant a verdict against either of the defendants on any of said counts; and that such evidence as was submitted had been illegally obtained in violation of the defendants' constitutional rights, and could not, therefore, be lawfully used against either of them. The court granted the motion as to count two, smuggling; but denied the motions as to counts one, conspiracy; three, possession, and four, transportation.

The jury rendered a verdict finding both defendants guilty on all of said first, third and fourth counts.

Thereupon the court pronounced judgment upon the verdict and sentenced the defendants as follows:

> "The sentence and judgment of the Court is that each of these defendants be confined in the United States Penitentiary at Atlanta, Ga., for one year and one day and that they be fined in addition thereto the sum of ten thousand dollars each. Now, if they have any property I would not fine them ten thousand dollars, if they have any property that would prevent them from taking the pauper's oath. That is on the conspiracy charge. Nothing on either of the other two charges. The confinement on account of the fine at the pentitentiary, Atlanta, Ga., to be after the expiration of the prisoners' sentence, and the Court will grant your writ of

error bill and bail is fixed at five thousand dollars each, and as I understand you have bondsmen here" (R., 82).

The case was reviewed on writ of error by the Circuit Court of Appeals for the Second Circuit and judgment was rendered on the 21st day of January, 1927, affirming the judgment of the district court, without opinion.

Specification of Assigned Errors Intended to be Urged.

1. The trial court erred in denying the preliminary motions of the petitioners to restrain the use of evidence unlawfully obtained through the false arrest of the petitioners, and the subsequest illegal search and seizure of their property by uniformed officers of the law, while acting as Federal agents in the purported enforcement of Federal law, on August 1, 1924; and for the return to the petitioners of the property seized from them, as aforesaid, and turned over to Federal prohibition agents; because said false arrest and illegal search and seizure were made without any warrant and without probable cause, in violation of their constitutional rights to be secure against unreasonable searches and seizures, to not be deprived of their liberty or property without due process of law, and to not be compelled to give evidence against themselves.

2. The trial court erred in admitting, over objections and exceptions of petitioners at the time of trial, the evidence unlawfully obtained as aforesaid;

because the same had been obtained by means of the false arrest of, and the unwarranted and illegal search and seizure from, the petitioners as aforesaid; and timely applications had been made for the return of said property and to quash said evidence.

3. The trial court erred in admitting, over objections and exceptions at the trial, evidence by Trooper Carroll that Mr. Frank Raymo "has the reputation of being a big bootlegger;" because the reputation of Frank Rayno, a stranger to the case, was incompetent and irrelevant; yet such evidence was improperly suggestive to the jury and highly prejudicial against the defendants.

4. The trial court erred in admitting, over objections and exceptions at the trial, testimony by the arresting and seizing officers that they had taken a revolver with cartridges from one petitioner and a pistol with cartridges from the other petitioner; and, at the time of admitting such property in evidence, in stating in the presence and hearing of the jury, "These things are competent evidence on one of the charges in the case, namely, the question of conspiracy" (R., 36), because it was shown that, at the times they were seized, there were also seized valid permits from courts of record, authorizing each of petitioners to carry such arms (R., 40 & 45); and because the lawful carrying of such arms was not evidence of any crime, although the prosecuting attorney, supported by the above quoted ruling, used their admission in evidence with telling effect in his summing up; and the trial court accepted

the matter in the charge, as follows: "that it could not be by a coincidence that two men from Utica could be up there in a car so near the Canadian line, driving from one place near the Canadian line on the way back towards Utica, each with a revolver loaded; that it could not be a coincidence, that it must have been pursuant to an agreement" (R., 73).

5. The trial court erred in denying the motions of petitioners to direct a verdict of not guilty on each of the counts, as to each of the petitioners, upon the grounds that there was not any legal evidence, or not sufficient evidence, to warrant the jury in finding a verdict of guilty on any of said counts, against either of the petitioners; because all of the evidence presented had been illegally obtained by means of the false arrests and the unwarranted searches and seizures, as aforesaid; and because such evidence as was offered and admitted (illegally, as petitioners claim) at most would but warrant the conviction of petitioner Gambino upon the charge of illegal transportation.

6. The trial court erred in charging the jury as follows: "If that be so, then, as far as the defendant Lima is concerned he is not guilty of conspiracy; he is not guilty of any other offense if he was in entire innocence of the fact that there was anything unlawful in that car or that any crime was being committed, or that any conspiracy had been made" (R., 74); because said charge, inferentially and in effect, amounted to a direction to find both of the defendants guilty on the charge of conspiracy, unless the jury believed that

petitioner Lima "was there and that he was in the car an entirely innocent man and in utter ignorance of the fact that any law was being violated or that there were any intoxicating liquors in the car" (R., 74).

Summary of Argument.

The lower court erred in affirming the judgment herein; because said judgment was shown to have been based entirely upon illegal evidence, and there was not any evidence of any kind to sustain the conspiracy charge. By agreement of counsel, and with the consent of the court, this case was simultaneously argued with the Whitney case. It was shown that these officers of the law were acting as Federal agents, for the purpose and with the intent of enforcing the National Prohibition Act, under color of authority granted to them by Section 26 of Title II of said act, according to the custom of State troopers, and as part of their official duties, by order of the governor of New York State; that they were also acting through prearrangement and understanding with Federal prohibition agents, and that pursuant to such prearrangement they turned the property seized and the persons arrested over to said Federal officers for prosecution in Federal court.

These State troopers, while acting as such Federal agents as aforesaid, made this false arrest, and the subsequent illegal searches and seizures, without any warrant or authority in law, without probable cause, and upon mere suspicion, for the purpose and with the intent of enforcing the National Prohibition Act, as

part of their official duties. The provisions of the Fourth and Fifth Amendments to the Constitution, therefore, do apply. The false arrests and imprisonment deprived petitioners of their liberty without due process of law; the searches and seizures were unreasonable, and in violation of the Fourth Amendment, and the use of the illegal evidence, obtained as aforesaid, amounted to compelling the petitioners to give evidence against themselves in a criminal action, in violation of the Fifth Amendment.

The offense of conspiracy was, obviously, charged against the petitioners as a penalty or punishment for insisting on their constitutional rights, as aforesaid. It was at most a constructive offense, and was not supported by any evidence.

Timely and appropriate motions and objections were urged in behalf of petitioners on all of the above grounds, both before the trial court, and especially at the review on writ of error before the Circuit Court of Appeals.

The judgment, being shown to be contrary to law in all the particulars as aforesaid, should have been reversed; yet the Circuit Court of Appeals affirmed the same, without opinion.

ARGUMENT.

POINT I.

New York State Troopers, as officers of the law, are authorized and directed to enforce the National Prohibition Act by Section 26 of Title II of said act, in the same manner and to the same extent as officers paid by the Federal Government.

NATIONAL PROHIBITION ACT, TITLE II.

> "SEC. 26. When the commissioner, his assistant, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction:".

In U. S. *vs.* Story, C. C. A., 5th Circuit, 294 Fed., 517, the court said:

> "The Eighteenth Amendment vests concurrent enforcement powers in the States, through either their legislative bodies or public officers.

National prohibition cases, 253 U. S., 350; 40 Sup. Ct., 486, 64 L. Ed. 946. Section 2 of Title 2 (Comp. St. Ann. Supp. 1923, 101381-2*a*) adopts Section 1014 of the Revised Statutes (Comp. St. 1674) as part of the procedure applicable to the enforcement of the act. Section 1014 provides for the arrest of offenders against the laws of the United States by State magistrates, 'Agreeably to the usual mode of process against offenders in such State.' It seems clear that Congress contemplated the enforcement of the amendment and of enforcement legislation through State officers as well as through Federal officers. Section 26 of the National Prohibition Act authorized 'any officer of the law' to make the arrest of the offender and the seizure of the offending intoxicating liquor and of the vehicle transporting it, and to proceed against the offender 'under the provisions of this title in any court having competent jurisdiction.' It is evident from the language quoted that Congress did not provide for an enforcement in Section 26 by Government officers and Federal courts exclusively.''

POINT II.

This arrest, search and seizure was made for the purpose, and with the intent, of enforcing the National Prohibition Act.

In the instant case the trial court did not permit any oral evidence to be taken on the preliminary motions.

At the time of trial, on cross-examination, the defense counsel attempted to question Trooper Carroll with respect to his knowledge of his rights and duties

in searching cars on such occasions, but counsel for the prosecution objected to such questions, and the court sustained the objections (R., 37). The affidavit of Trooper Carroll, filed in opposition to the preliminary motions, did not purport to controvert or deny any of the allegations contained in the petitioners' affidavits, filed in support of said motions. "Said answering affidavit merely alleged that on the 1st day of August, 1924, the affiant, J. T. Carroll, New York State policeman, and Trooper Travis were driving on the highway from Massena, N. Y., to Hogansburg, N. Y., in a Ford automobile. 'That they met a Buick roadster, which was loaded very heavily. That deponent noticed that the license plates were from a county in the central part of the State. That these facts, together with the fact that the car was heavily loaded and was traveling at a speed of about 25 or 35 miles per hour, and from his experience which he has had with the activities in transporting intoxicating liquors in the northern part of the State, these facts led him to believe that this was a load of intoxicating liquor. That deponent and Trooper Travis turned around and apprehended the driver and occupant of said Buick roadster. That said Buick roadster was being driven at that time by Rosario Gambino, and the occupant was Joseph Lima. That these two were placed under arrest at the time. Deponent further says that at the time there were no Federal officers present, and that they were not working in conjunction with Federal officers'" (R., 28). Although this affidavit fails to show probable cause for the affiant's alleged belief, yet

it does clearly show that the false arrest was made upon mere suspicion that the Volstead Act was being violated.

On his direct examination at the trial this witness testified, "I have been stationed up along the northern border three years and eight months and have had considerable experience with cars transporting various liquors," and that "cars loaded or hanging that way have usually been loaded with booze coming from the border." That the two troopers then turned their car about and followed defendants' car to Rayno's Garage, in the village of Massena, in front of which the defendants stopped. That witness Carroll then asked defendant Gambino for his registration card, and that same was shown to him. That witness then asked defendant what he had in his car and was told by defendant to find out. That witness then asked for the key. That defendant refused to give him the key. That witness then took his car and shook it and heard the bottles and asked how many cases he had on. That defendant told him to find out. That defendant Lima was meanwhile walking towards the garage. That trooper Travis went and brought him back to the car. That Gambino got into the Ford car with witness and was driven to the police station (R., 29). From which it again clearly appears that the arrest was made solely upon suspicion that the car might be carrying contraband liquor. "That after leaving the garage the two troopers and the defendants drove to the police station at Massena, witness driving the Buick roadster with Lima riding with him, and Travis driving the

Ford with Gambino riding beside him. That on arriving at the police station witness again asked for the key and was told to go ahead and find it; so he did and found it in the left hand side pocket of the car. That he opened the rear end of defendants' car and found therein fourteen cases of Canadian ale with the bottles packed tightly neck to neck" (R., 31). "That he thought he had now told the court and jury everything that had happened on this occasion. That he then arraigned these defendants before the United States Commissioner and defendants waived examination and were held by the Commissioner" (R., 34). "That the car was then taken 'behind the police station, until turned over to the agents of the Border Patrol'" (R., 41). "That the car was turned over to the Federal officer completely unloaded and reloaded after such delivery" (R., 42). Trooper Travis testified, "That the car seemed to be heavily loaded, and the rear fender was riding close to the wheels, in the way that generally indicates a loaded car. That the troopers then turned around and followed the defendants' car" (R., 35). "That they overtook defendants' car in front of Rayno's Garage in the village of Massena. That defendant Lima jumped out of the Buick car and ran inside of the garage, followed by witness, who overtook him in the garage and brought him back. That Gambino was still in the Buick car. That no effort had been made to get into the car that he knew of. That he then took Gambino in the Ford car and drove to the police station at Massena. That Sargeant Carroll and defendant Lima went to the police station in

the Buick car. That he did not recall hearing any conversation in front of the garage. That at the police station the two loaded guns were taken from Gambino and Lima, and cartridges and some money, and they showed their revolver permits. That the car and other property seized from defendants were turned over to inspector Robillard. That witness assisted in unloading the bottles from defendants' car" (R., 45, 46). By agreement of counsel and with the consent of the circuit court of appeals this case was argued simultaneously with the Whitney case at the review on writ of error. It was there urged in behalf of these petitioners (in addition to the foregoing admissions of the arresting officers as to their reasons for making the false arrest and the subsequent illegal searches and seizures, the turning the seized property over to Federal officers, and arraigning defendants before a United States Commissioner) that these acts of these officers of the law were not their individual misconduct, but were official acts, done as part of their official duties, under orders of the Governor of the State of New York, to aid in the enforcement of the National Prohibition Act, under authority granted to "any officer of the law" by Section 26 of Title II of said act. That said acts were also done under instructions to State troopers, by Federal authorities, that they do not need any search warrant and that "our uniform represents the search warrant" (Whitney, R., 9). That the property seized and the persons arrested were turned over to Federal authorities for prosecution in Federal court, according to the custom of, and instructions to, State

troopers for enforcing the National Prohibition Act (Whitney, R., 9).

It was further urged in behalf of the petitioners that brief of the defendant in error, at page 6, admitted and alleged as follows:

> "It is common knowledge that the Governor of this State, although urging successfully the repeal of the Mullen-Gage State Prohibitory Act, and even now in his recent message, has urged the enforcement of the National Prohibition Act, although opposed to the statute. He announced before this case arose that State officers should take part in the enforcement of the National Prohibition Act, and this action of our State executive is a matter of current history, of which courts have judicial knowledge, and take judicial notice."

POINT III.

This false arrest and illegal search and seizure were made without warrant or authority in law, without probable cause, and upon mere suspicion, by authorized agents of the Federal Government, for the purpose of enforcing Federal law.

The petitioners' claim, that the arresting officers acted without warrant, was not controverted (R., 26). The facts alleged in the answering affidavit as grounds for making the arrest, and the subsequent searches and seizures, are merely, "That the license plates were from a county in the central part of the State." "That the car was heavily loaded," and "was traveling at a

speed of about 25 or 35 miles per hour" (R., 27). There is no suggestion of crime in any of those facts. Not even the court by its warrant could authorize a search and seizure under them. Much less could an officer, acting without warrant, be authorized. Nor is the matter helped by the affiant's statement that "from his experience which he had had with the activities of transporting intoxicating liquors in the northern part of the State, these facts led him to believe that this was a load of intoxicating liquor." Since the affiant does not disclose any facts of his experience, it adds nothing to the basis of his alleged belief. Clearly such belief is not warranted by the facts stated.

In his testimony at the time of trial Trooper Carroll, obviously in the effort to strengthen the case by alleging additional grounds for the false arrest and subsequent illegal searches and seizures, said that before making the arrests he shook defendant's car and heard bottles rattle (R., 29). On cross-examination this witness testified that Gambino invited him to find out what was in the car (R., 37). That Gambino asked him if he couldn't fix it up and witness said, "No, of course not" (R., 38). That he "kind of lifted the back of the car and let it drop and you could hear bottles clink" (R., 38). That he told the two defendants and his partner, Trooper Travis, that he heard bottles clink at the time. That his partner was there when he told the two defendants about it. That there were also other people standing around, but witness didn't know whether they heard it (R., 39). It is significant to note that although Trooper Travis testified in the case on

two different days thereafter, he did not attempt to corroborate any of this testimony by witness Carroll. Instead thereof, he testified "That he did not recall hearing any conversation in front of the garage" (R., 45). In his answering affidavit witness Carroll omitted to mention anything about hearing bottles clink or rattle, and in his cross-examination testified "That at the time he opened the rear compartment of defendant's car at the police station, he noticed that the bottles were packed in well with excelsior or something like that, so that they would not break against one another, but not packed in tightly, and not loosely, but loose enough to rattle. That he took some of the bottles out of the rear compartment and saw some others taken out, but did not see them all taken out, and saw an attempt made to put them back in, but that all of them would not go back in, because they were not packed the same way, and some of them were put in the front seat of the car" (R., 41).

Again this witness, Carroll, testified that the place at which the arrests were made was known to him as Rayno's Garage. That Frank Rayno was the proprietor of the same and had the reputation of being a bootlegger (R., 31). In these additions to his testimony this witness was not corroborated in any way, but was flatly contradicted by the affidavits of N. A. Santamour and George Aubrey, showing that the place was known as "the Reno Garage, of which Santamour was the proprietor and said Aubrey was an employee" (R., 25).

In overruling petitioners' objections to Carroll's

testimony about the reputation of "Frank Rayno," the trial court said:

> "It is admissible, not as to whether or not the defendants committed any of the crimes. As to those things, it is not competent and material at all, but it has a bearing on whether or not they had reasonable grounds to suspect that the automobile contained intoxicating liquors. So, on that ground and on that ground alone, the jury will understand the objection is overruled" (R., 30).

From the above-quoted ruling it seems that even the trial court did not consider that there was any probable cause for believing that the law was being violated, known to either of the arresting and seizing officers and that their testimony merely alleged grounds for suspicion.

As shown in Point I, these State troopers were authorized agents of the Federal Government for enforcing this particular Federal law.

As shown in Point II, this arrest, search, and seizure was made by them for the purpose, and with the intent, of enforcing the National Prohibition Act.

POINT IV.

The restrictions of the fourth and fifth amendments to the Constitution of the United States apply to any exercise of the power of the Government through any of its authorized agencies.

Boyd *vs.* United States, 116 U. S., 616:

This Court, in speaking of Lord Camden's judgment in the case of Entick *vs.* Carrington and three other

King's Messengers, 19 Howells State Trials, 1029, said, at page 626:

> "The law as expounded by him has been regarded as settled from that time to this, and his great judgment on that occasion is considered as one of the landmarks of English liberty. It was welcomed and applauded by the lovers of liberty in the Colonies as well as in the Mother Country. * * * As every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the Fourth Amendment to the Constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures. We think, therefore, it is pertinent to the present subject of discussion to quote somewhat largely from this celebrated judgment."

At page 627 this Court quotes from said judgment as follows:

> "'The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole.'"

On page 630 this Court said:

> "The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the Government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment."

Adams *vs.* New York, 192 U. S., 585:

At page 598 this Court said:

> "The origin of these amendments is elaborately considered in Mr. Justice Bradley's opinion in the Boyd case, *supra*. The security intended to be guaranteed by the fourth amendment against wrongful search and seizures is designed to prevent violations of private security in person and property and unlawful invasion of the sanctity of the home of the citizen by officers of the law, acting under legislative or judicial sanction, and to give remedy against such usurpation when attempted."

Weeks *vs.* United States, 232 U. S., 383:

At page 392 this Court said:

> "The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights."

At page 394 this Court also said:

> "In Adams *vs.* New York, 192 U. S., 585, this Court said that the Fourth Amendment was intended to secure the citizens in person and property against unlawful invasion of the sanctity of the home by officers of the law acting under legislative or judicial sanction. This pro-

tection is equally extended to the action of the Government and officers of the law acting under it (Boyd case, *supra*). To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action."

Gouled *vs.* United States, 255 U. S., 298:

At page 303 this Court said:

"The Fourth Amendment reads, 'The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.' The part of the Fifth Amendment here involved reads, 'No person * * * shall be compelled in any criminal case to be a witness against himself.'

"It would not be possible to add to the emphasis with which the framers of our Constitution and the court (in Boyd *vs.* United States, 116 U. S., 616; in Weeks *vs.* United States, 232 U. S., 383, and in Silverthorne Lumber Co. *vs.* United States, 251 U. S., 285) have declared the importance to political liberty and to the welfare of our country of due observance of the rights guaranteed under the Constitution by these two amendments. The effect of the decisions cited is: that such rights are declared to be indispensable to the 'full enjoyment of personal security,

personal liberty and private property;' that they are to be regarded as of the very essence of constitutional liberty, and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen—the right to trial by jury, to writ of *habeas corpus*, and to due process of law. It has been repeatedly decided that these amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers."

Carroll *vs.* United States, 45 S. Ct., 280.

At pages 283-284 this Court said:

"(2) On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid."

at page 285:

"Having thus established that contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant, we come now to consider under what circumstance such search may be made. It would be intolerable and unreasonable

> if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise."

at page 286:

> "The measure of legality of such a seizure is, therefore, that the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported."

and at page 287:

> "The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law."

Again at page 288 this Court quotes with approval its own former definition of probable cause as follows:

> "If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient."

By the foregoing authority it is clearly made to appear that suspicion is not enough to justify a search and seizure without warrant; that there must be probable cause, *i. e.*, facts and circumstances known to the seizing officer such as would warrant a man of prudence and caution in believing that the law was being violated.

That the known facts and circumstances in the Carroll case, as marshaled and recited in the learned opinion in that case, was held by this Court to constitute probable cause for making that particular search and seizure, certainly does not authorize the judgment of the lower Court here complained of. The opinion in the Carroll case distinctly states at page 288:

> "In the light of these authorities, and what is shown by this record, it is clear the officers here had justification for the search and seizure. This is to say that the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched."

It has been shown in Point I that these officers were, by Federal statute, authorized agents of the Government for the enforcement of the National Prohibition Act.

In Point II that they here acted with the purpose and intent of enforcing this Federal law.

In Point III that they here so acted illegally, without warrant, without probable cause, and upon mere suspicion.

Can it be said in reason, that, because these authorized agents of the Federal Government happened also to be State officers, they were privileged to violate the constitutional rights of citizens? Can the Government give legislative sanction to such officers, and then be heard to disclaim responsibility for the acts done under color of such authority? Is the claim of these officers that they do not need any search warrant tenable? What need remains for any search warrant, if these State officers may search *ad libitum*, without warrant? Why should prohibition agents bother with search warrants if State officers may do without them, especially if such State officers customarily turn the property seized over to them, and Federal courts permit the use of evidence so obtained?

POINT V.

There was not any evidence in the case to support the conspiracy charge.

The mere fact that petitioner Lima was riding in Gambino's car at the time of the unlawful search and

seizure, standing alone, is not evidence of any crime. It is consistent with the theory of innocence, as well as with the theory of guilt; and, at most, is but a suspicious circumstance. If aided by adroit suggestions of the prosecution, and the court, the imagination of zealous jurymen might easily construct a fabric of conspiracy upon the foundation of suspicious circumstance. The further circumstance that each of these petitioners was at the time bearing arms, though lawfully, with permit, is but further ground for suspicion; suspicion, perhaps, of criminal conspiracy, as well as of other possible crimes.

In the instant case the court stated, in the presence and hearing of the jury, in reference to the revolver and pistol and cartridges seized:

> "That these things are competent evidence upon one of the charges in the case, namely, the question of conspiracy" (R., 36).

Later the court charged the jury:

> "The Government says * * * that it could not be by a coincidence that these two men from Utica could be up there in a car so near the Canadian line, driving from one place near the Canadian line on the way back towards Utica, each with a revolver loaded; that it could not be a coincidence, that it must have been pursuant to an agreement.
>
> "If you are satisfied beyond a reasonable doubt that there was an agreement and that these men were there by this agreement and that they were doing something in carrying out that

agreement, why, then, you may find them guilty of conspiracy" (R., 73).

There was not any other evidence, purported evidence, or suspicious circumstance in the case, which was urged or claimed in support of the charge of conspiracy. On these two suspicious circumstances, then, was the conviction of conspiracy founded.

The brief of the defendant in error, before the circuit court of appeals, urged in addition that one of the State troopers testified that when the Buick car stopped in front of the garage, Lima jumped out and ran into the garage. That this was evidence of an attempt to escape on the part of Lima and was an indication of guilt. But no such claim was made or urged at the time of the trial, either by the prosecuting attorney or by the trial court. The grounds there urged as supporting the charge of conspiracy were merely the two aforesaid suspicious circumstances, as is clearly indicated by the above quotation from the charge. Furthermore, the testimony of the other trooper on the subject was that petitioner Lima walked towards the garage. "That defendant Lima was meanwhile walking towards the garage" (R., 29).

In Davidson *et al. vs.* U. S., 247 Fed., 285, and in Winsor *vs.* U. S., 286 Fed., 51, it was held that while it is not essential to establish conspiracy that actual proof be offered of a definite plan or agreement entered into by conspirators, yet the prosecution must at least show a concert of action in the commission of an unlawful act or other facts and circumstances from

which the natural inference arises that the unlawful overt act was in furtherance of a common design intent and purpose of the alleged conspirators.

In Stafford *et al. vs.* U. S., 300 Fed., 537, evidence that two defendants were riding in an automobile in which intoxicating liquor was being transported, and when the car was wrecked the driver attempted to escape, was held not sufficient to support conviction of conspiracy to transport liquor and sufficient only as to the driver to support conviction for unlawful transportation. The court, in its opinion, said:

> "The defendants' plea of not guilty placed the burden upon the Government to establish the guilt of the defendants upon each count of this indictment beyond a reasonable doubt. To meet this burden the Government offered as witness the two prohibition enforcement officers who made the arrest. These witnesses testified that they were driving along the highway in an opposite direction from the direction in which these defendants were going; that when they passed the defendants they saw something covered over in the rear part of the automobile, and for that reason turned and followed it. The defendants or one of them, drove the Buick roadster at about 55 miles an hour without slackening for curves, and in making a reverse curve the rear end of defendant's car left the roadway and struck the fence; that the defendant Stafford, who it is claimed was owner of this car, or at least was driving it, then jumped out of the car and started to run away. One of the officers shot in the air to frighten him and he

stopped and came back toward the car. The defendant Shelton was standing by the side of the car when the officers reached him. After arresting both defendants the officers searched the car and found therein 16 kegs of whiskey containing 5 gallons each.

"The Government offered no other or further evidence to prove the charge of conspiracy, except that these two defendants were riding in the car in which the intoxicating liquor was being transported, and when the car was wrecked Stafford attempted to escape. To sustain a charge of conspiracy the Government need not furnish direct proof of the unlawful plan or agreement, but such charge may be sustained by evidence showing a concert of action in the commission of an unlawful act, or by proof of other facts from which the natural inference arises that the unlawful overt act was in furtherance of a common design of the alleged conspirators. Winsdor *vs.* U. S. (C. C. A.), at 286 Fed., 51.

"In Windsor *vs.* U. S., *supra*, this Court sustained a conviction for conspiracy where a person riding in, but not driving a car in which intoxicating liquors was being unlawfully transported, jumped from the car and fled from the arresting officer, upon the theory that flight indicated guilty knowledge, but in this case it was the driver of the car that attempted to escape. While it does not clearly appear that Stafford was the driver of this car, nevertheless that fact was conceded in the argument of the case, and the trial court so stated in its opinion upon the motion to quash. Stafford, as the driver

of the car, must be held to have had knowledge that it was then and there being used for the unlawful transportation of intoxicating liquors. There is no evidence whatever tending to show when or under what circumstances Shelton got into this car. He may have had knowledge at the time he got into the car of the unlawful purposes for which it was then being used, or he may have acquired such knowledge after he became a passenger in the car and still have had no connection whatever with the unlawful project. The fact that he was riding in the car with Stafford is a suspicious circumstance, but suspicious circumstances do not constitute proof of guilt beyond a reasonable doubt. On the other hand, he may not have had any knowledge whatever as to the contents of the car, and for that matter may have been an entire stranger to Stafford and riding in the car at his invitation.

"In the opinion of this Court, the evidence offered on the part of the Government in this case is not sufficient to furnish a substantial basis for a finding by the jury, beyond a reasonable doubt, that Shelton had entered into a conspiracy with Stafford for the commission of this offense, or that he was aiding or participating in the commission thereof.

"For the reasons stated, the judgment of the district court is reversed as to Shelton on both counts, and as to Stafford upon the first count. The cause is remanded for sentence of Stafford upon the second count, and for further proceedings in accordance with this opinion."

All of which is respectfully submitted in support of the petition, in the earnest hope that the prayer thereof may be granted by this Honorable Court.

IRVING K. BAXTER,
Counsel for Petitioners.

66 Genesee St., Utica, N. Y.

(5563)

INDEX.

	Page
Supplemental brief for petitioners	1
Point I. The Government brief errs in claiming defendants omitted to object to evidence obtained by unlawful search and seizure	1
Point II. The summary of alleged probable cause in the opposing brief is erroneous and contrary to the testimony of arresting officers	5
Point III. The cases cited in the opposing brief under "II," in the effort to show that the constitutional provisions are not applicable, are not in point.	8

Table of Cases Cited.

Byars v. United States, 273 U. S., 28	11, 12
Schroeder v. United States, 7 F. (2d), 60	13
Weeks v. United States, 232 U. S., 383	11

Constitutions and Statutes Cited.

Constitution U. S., Fourth, Fifth, and Sixth Amendments	2
National Prohibition Act, Sec. 26, Title II	10, 13

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 226.

ROSARIO GAMBINO AND JOSEPH LIMA,
PETITIONERS,

vs.

THE UNITED STATES OF AMERICA,
RESPONDENT.

SUPPLEMENTAL BRIEF FOR PETITIONERS.

POINT I.

The Government brief errs in claiming defendants omitted to object to evidence obtained by unlawful search and seizure.

At page 5 the opposing brief states:

> "No objection was made by the defendants at the trial to the introduction of evidence relating

> to the search and seizure until the Government's fifth and final witness had taken the stand. The objections then interposed and overruled were to testimony of the Government's chemist regarding the contents of a sample of the seized liquor, the ground of objection being that the search and seizure by which the State officers had procured the sample were without warrant of law, State or Federal, and in violation of the defendants' rights under the Fourth, Fifth, and Sixth Amendments" (R., 50, 51, 61).

The references (R., 50, 51, 61) correspond to pages 34, 35, 42 and 43 of the Transcript of Record now before the Court. They show that when offers were made of alleged evidence obtained by the search and seizure, the defendants made timely and appropriate objections on constitutional and other grounds.

Again at page 11 the opposing brief states:

> "That the witness then found the key in the left side pocket of the car, and opening the rear end of the defendants' car found therein fourteen cases of Canadian ale (R., 31). On motion of the defendants, the court struck out that part of the testimony which described the contents of the bottles as Canadian ale and refused to permit the witness to describe the labels on the bottles, on the ground that the labels themselves were the best evidence of that (R., 31). Later, however, the Government was permitted to show by another witness that at the time of its seizure the Buick roadster contained 336 bottles of Canadian ale (R., 46). The testimony of Trooper Carroll was corroborated by that of

Trooper Travis, who additionally testified that Hogansburg was on the border line of Canada fourteen miles from Messena" (R., 34).

The reference (R., 31) corresponds to pages 19 and 20 of the Transcript of Record now before the Court, and reads as follows:

"That on arriving at the police station witness again asked for the key and was told to go ahead and find it; so he did, and found it in the left-hand side pocket of the car. That he opened the rear end of defendants' car and found therein fourteen cases of Canadian ale with the bottles packed tightly neck to neck. On motion of defendants, the Court ordered stricken out that part of the testimony in which the witness designated the contents of the bottles as Canadian ale. That the witness did not taste or smell the contents of any of the bottles. That there were labels on the bottles, but was not allowed to describe the labels or testify to what was on them, because the Court sustained the objection of the defendants that the labels themselves were the best evidence."

The reference (R., 46) corresponds to pages 31 and 32 of the Transcript of Record now before the Court, and reads as follows:

"That there was a Buick roadster, 336 bottles of Canadian ale, a .25 Colt automatic, and a .32 Dreys Revolver, turned over to him by said State Troopers, on that date. That Government's Exhibits Nos. 1, 2, 3, and 4 were so turned over to him. That immediately thereafter he

took four bottles up to the office at Malone and locked them up and next day he turned them over to Mr. Steenbaerge, in the same condition in which he had received them from State Troopers. That Government's Exhibit No. 5 was one of the bottles he had turned over to Mr. Steenbaerge on that day.

"To all of which testimony the defendants, by their counsel, objected on the ground that it was irrelevant, incompetent and immaterial. That it was statements of conclusion or opinion on the part of the witness. That the witness was not shown qualified to give such opinion evidence; and that said evidence was not a statement of facts within the witness' knowledge. But the Court overruled the objections, stating that counsel for the defense might interrogate the witness on cross-examination about his knowledge. To which rulings of the Court the defendants, by their counsel, then and there duly excepted."

This testimony is not "that at the time of its seizure the Buick roadster contained 336 bottles of Canadian ale," as erroneously alleged in the opposing brief. It is merely that certain specified property was turned over to the witness. This was not claimed to have been done in the presence of the petitioners. There was no allegation that any of the property belonged to them or had been taken from them. It was enough, therefore, that this testimony was objected to as irrelevant, incompetent, and immaterial, and that the designation of some of it as "Canadian ale" and the statement that it was turned over to another person in

the same condition as when received by the witness were unwarranted conclusions. The offer of exhibits in evidence was objected to on constitutional and other grounds, as was also the chemist's testimony as to his examination of them.

Hardly less erroneous is the final statement in the above quotation from the respondent brief. The testimony of Trooper Travis nowhere alleged that any "Canadian ale" or other intoxicating liquor was found on the seizure. It flatly failed to corroborate in any way the testimony of Carroll about shaking the car and hearing bottles rattle or about the place at which the arrest was made being known as "Rayno's Garage," and that Rayno was known as a bootlegger; as more fully appears in petitioners' original brief, at pages 19 and 20.

Point II.

The summary of alleged probable cause in the opposing brief is erroneous and contrary to the testimony of the arresting officers.

At page 11, the opposing brief states:

> "It is submitted that where, as in this case, experienced officers patrolling a highway in the vicinity of the Canadian border observe a heavily loaded automobile proceeding from the direction of the border stop at the place of a well-known bootlegger and before any search or arrest is made discover that the load is contained in bottles, they have probable cause for

> belief that the automobile is being used for the illegal transportation of intoxicating liquor."

In the answering affidavit, filed in opposition to the preliminary motion to restrain the use of evidence obtained by the false arrest and subsequent illegal search and seizure, the witness Carroll said:

> "That they met a Buick roadster, which was loaded very heavily. That deponent noticed that the license plates were from a county in the central part of the State. That these facts, together with the fact that the car was heavily loaded and was traveling at a speed of about twenty-five or thirty miles per hour, and from his experience which he has had with the activities in transporting intoxicating liquors in the northern part of the State, these facts led him to believe that this was a load of intoxicating liquor. That deponent and Trooper Travis turned around and apprehended the driver and occupant of said Buick roadster. That said Buick roadster was being driven at that time by Rosario Gambino and the occupant was Joseph Lima" (R., 17).

The facts alleged were merely "That the license plates were from a county in the central part of the State." "That the car was heavily loaded," and "was traveling at a speed of about 25 or 35 miles per hour." There is no suggestion of crime in any of those facts. Not even the court by its warrant could authorize a search and seizure under them. Much less could an officer, acting without warrant, be au-

thorized. Nor is the matter helped by the affiant's statement that "from his experience which he has had with the activities of transporting intoxicating liquors in the northern part of the State, these facts led him to believe that this was a load of intoxicating liquor." Since the affiant does not disclose any facts of his experience, it adds nothing to the basis of his alleged belief. Clearly such belief is not warranted by the facts stated.

Since these were the only allegations of fact in opposition to the preliminary motions, there can be no basis for the claim that in denying same the trial court found as matters of fact that witness Carroll shook the car and heard bottles rattle, or that the car stopped "at the place of a well-known bootlegger." Not only was the witness Carroll contradicted in these allegations by the four witnesses whose affidavits were submitted in behalf of the preliminary motions, but he was not even corroborated by the testimony of the other trooper who testified after hearing such allegations by Carroll. As to the allegation about hearing bottles rattle, the witness substantially contradicted himself in his direct testimony, as follows: "That he opened the rear end of defendant's car and found therein fourteen cases of Canadian ale with the bottles packed tightly neck to neck" (R., 19), and in his cross-examination, as follows: "Witness then testified that at the time he opened the rear compartment of defendant's car at the police station, he noticed that the bottles were packed in well with excelsior or something like that, so that they would not break against

one another, but not packed in tightly, and not loosely, but loose enough to rattle. That he took some of the bottles out of the rear compartment and saw some others taken out, but did not see them all taken out, and saw an attempt made to put them back in, but that all of the bottles would not go back in, because they were not packed the same way, and some of them were put in the front seat of the car" (R., 27). Even if this witness had "kind of lifted the back end of the car and let it drop" (R., 25), he could not have heard bottles clink which were packed in well with excelsior, and so tightly that when some of them were taken out and an attempt made to put them back in they would not all go back in.

Point III.

The cases cited in the opposing brief under "II," in the effort to show that the constitutional provisions are not applicable, are not in point.

All of the above-mentioned cases arose in States having State prohibition laws, with the exception of the seventh case cited. In each of these cases the State officers acted under color of authority of State laws. In none of the cases did they assume to act under Federal authority. The courts held that the fourth amendment is a restraint upon the Federal Government and its agents, and does not apply to the individual conduct of State officers. Even if this be so, it has no application to the instant case, because here the officers acted as Federal agents, with the pur-

pose and intent of enforcing Federal law, and under color of authority of Federal law. This illegal search and seizure was not an incident to some other or lawful procedure. Nor was it their individual misconduct. It was their official act, pursuant to order of the governor of New York State that they should exercise the authority granted to them by Federal statute in the enforcement of this Federal law as part of their official duties. As is cited in petitioners' original brief at page 34, the United States attorney for the Northern District of New York admitted and alleged in his brief before the lower court:

> "It is common knowledge that the Governor of this State, although urging successfully the repeal of the Mullen-Gage State Prohibitory Act, and even now in his recent message, has urged the enforcement of the National Prohibition Act, although opposed to the statute. He announced before this case arose that State officers should take part in the enforcement of the National Prohibition Act, and this action of our State executive is a matter of current history, of which courts have judicial knowledge, and take judicial notice."

It is also a matter of common knowledge and current history, of which courts have judicial knowledge, and take judicial notice; that the Governor of New York State, in successfully urging the repeal of the State Prohibition Law, claimed that State officers are authorized agents of the Federal Government for the enforcement of the National Prohibition Act; and that,

immediately after the repeal of the State Prohibition Law, said Governor, as commander-in-chief of New York State policemen, ordered them to exercise their statutory authority as such Federal agents in the enforcement of said Federal law, as part of their official duties.

Yet the opposing brief argues at page 16:

> "There was no proof in either the Gambino or the Ostrander case that the State officers were acting as Federal agents when making the search and seizure. The only evidence upon the point in the Gambino case was a statement by Trooper Carroll in a deposition filed by the Government in opposition to the motion to suppress evidence. After describing therein the circumstances under which he and Trooper Travis had made the search and seizure, Trooper Carroll stated:
>
> "'Deponent further says that at the time there were no Federal officers present, and that they were not working in conjunction with Federal officers' (No. 1071, R., 28)."

Perhaps it is "no proof"; but the attention of the trial court was called to Section 26 of Title II of the National Prohibition Act, and the claim was made by counsel that these officers of the law assumed to be acting under the authority and direction of this Federal law (R., 35). Also counsel for defendants attempted to question these officers as to their rights and duties in making such arrests and seizures, "but counsel for the prosecution objected to such questions, and the court sustained the objections" (R., 24).

The "statement of Trooper Carroll," which is referred to as "the only evidence upon the point," is substantially that by observing certain alleged facts, to wit: "That the license plates were from a county in the central part of the State"; "that the car was heavily loaded and was traveling at a speed of about twenty-five or thirty-five miles per hour," he was led to "believe that this was a load of intoxicating liquor." That the officers then "apprehended" the car and arrested the petitioners (R., 17). They then at once proceeded against them in Federal court, and turned the seized property over to Federal Prohibition headquarters. Were the officers here claiming to act "under any claim of Federal authority?" (Weeks *v.* United States, 232 U. S., 383). Or were they claiming to be "operating entirely upon their own account?" (Byars *v.* United States, 273 U. S., 28). If these officers were acting without Federal authority, then were they acting at their personal peril. For it cannot be held in reason that these State officers are not authorized agents of the Federal Government in making such seizures and arrests; and also be held, that citizens are required by law to submit to such seizures and arrests by them.

There seemed to be a kind of zeal in both the district and circuit courts to convict the petitioners, in aid of Volstead enforcement, regardless of the effect upon older principles of law. In vain was it pointed out that to hold that the acts of these officers of the law were not subject to constitutional restraint, was substantially to hold that they were without au-

thority to seize and arrest in any Volstead case, and to give notice to all Volstead violators that they need not submit to such seizures and arrests by them. At the argument before the lower court, while counsel for petitioners was urging that the lawful possession of firearms, without any attempt to use them, was not evidence of conspiracy or of any other crime, Judge Learned Hand remarked, "If they had used them, they would probably be here for murder instead of conspiracy." To which counsel replied, "Would it have been murder? Then these officers must have been acting under authority of Federal law, for there was no State law under which they could have been acting." The same judge later inquired from the U. S. Attorney if it were not a fact that the liquor was actually found in the car. Government counsel replied that it was; that is, that Canadian ale was so found. Counsel for petitioners in reply urged that it was immaterial what was found in the car; that the plaintiffs in error were not there pleading to an indictment, but were arguing points of constitutional law. At substantially the same time, in the Byars case (*supra*), this Honorable Court was re-announcing that sound principle of law, as follows:

> "Nor is it material that the search was successful in revealing evidence of a violation of a Federal statute. A search prosecuted in violation of the Constitution is not made lawful by what it brings to light; and the doctrine has never been recognized by this Court, nor can it be tolerated under our constitutional system,

> that evidences of crime discovered by a Federal officer in making a search without lawful warrant may be used against the victim of the unlawful search where a timely challenge has been interposed."

The lower court, in affirming the judgment of the trial court, wrote no opinion. But it announced orally that this case seemed to come under their decision in Schroeder *v.* United States, 7 F. (2d), 60. That case is distinguished from the instant case in that the city policemen did not claim to act under color of authority of Section 26 of Title II of the National Prohibition Act. Two city police detectives simply saw a man carry a package to an automobile. Their suspicion being aroused, they questioned the man and his answers seemed to confirm their suspicion that there was something wrong about the package. So they seized the same and took it to police headquarters. They made no arrest and made no seizure of the car, or otherwise acted as directed by Federal statute (*supra*). Later the package was opened and found to contain six bottles of gin. "On the following day he took these bottles to the United States chemist in the Federal Building and reported the circumstances to the assistant United States attorney, whereupon an application for a warrant was made, the witness swearing to a complaint at that time." Counsel for petitioners pointed out these essential differences and urged before the lower court that in the Schroeder case the policemen obviously acted without claim or pretense of Federal authority, and that the discovery

of the Federal violation was a mere incident to some other procedure; whereas in the instant case the discovery of a possible Federal violation was the avowed purpose and object of the procedure, and the State policemen clearly did act under claim of Federal statutory authority. A judge of the lower court replied that the Schroeder case (*supra*) was submitted on an agreed statement of facts that the search was made for a violation of the liquor law, and that the cases were therefore not distinguishable. Thus it clearly appears that the decision here complained of was not based on a finding of probable cause to justify the search and seizure, nor on a finding that the State officers acted on their own responsibility and without claim of Federal authority. This decision clearly was that State officers "do not need any search warrant" (petitioners' original brief, page 33) in the enforcement of Federal law, regardless of whether or not they be acting as Federal agents under claim of authority granted to them by Federal statute. As above shown, this decision is contrary to reason and contrary to the applicable decisions of this Court. It should accordingly be reversed.

All of which is respectfully submitted to the attention of this Honorable Court.

IRVING K. BAXTER,
Counsel for Petitioners.

66 Genesee St., Utica, N. Y.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement	2
No. 1040	2
No. 1071	4
No. 1073	6
Argument:	
I. The searches and seizures were made upon probable cause	8
II. The State officers were not agents of the United States	14
Conclusion	17

AUTHORITIES CITED

Cases:	
Ash v. *United States*, 280 Fed. 277	10
Burdeau v. *McDowell*, 256 U. S. 465	14
Byars v. *United States*, No. 72, Oct. Term, 1926; decided Jan. 3, 1927	16
Carroll v. *United States*, 267 U. S. 132	9
Coates v. *United States*, 290 Fed. 134	16
Elam v. *United States*, 7 F. (2d) 887	16
Hirata v. *United States*, 280 Fed. 197	16
Lambert v. *United States*, 282 Fed. 413	10
McGrew v. *United States*, 281 Fed. 809	15
Milam v. *United States*, 286 Fed. 629	10
Nunn v. *United States*, 4 F. (2d) 380	16
Riggs v. *United States*, 289 Fed. 273	16
Robinson v. *United States*, 292 Fed. 683	16
Schroeder v. *United States*, 7 F. (2d) 60	16
Twining v. *New Jersey*, 211 U. S. 78	14
Weeks v. *United States*, 232 U. S. 383	14
Statutes:	
Constitution of the United States—	
Fourth Amendment	3, 5, 8
Fifth Amendment	3, 5, 8
Sixth Amendment	5, 8
Judicial Code, Section 240 (a), as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938	2
National Prohibition Act (Act of October 28, 1919, c. 85, 41 Stat. 305), Title II—	
Section 3	4
Section 26	15

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 1040

ROBERT C. WHITNEY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1071

ROSARIO GAMBINO AND JOSEPH LIMA, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 1073

FRED OSTRANDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

No opinion was rendered in these cases by either court below, the judgment of the District Court in each case being affirmed *per curiam*.

JURISDICTION

The judgments of the Circuit Court of Appeals sought to be reviewed were entered January 28, 1927. (No. 1040, R. 58; No. 1071, R. 92; No. 1073, R. 65.) The petition for a writ of certiorari in No. 1040 was filed April 12, 1927, and those in Nos. 1071 and 1073, April 20, 1927. Jurisdiction to issue the writs applied for is conferred upon this Court by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the searches of automobiles and seizures of the liquor they contained were made upon probable cause.

2. If not, whether the searches and seizures, made in these cases by State officers, were subject to the requirements of the Fourth Amendment.

STATEMENT

These three cases were heard together in the court below (No. 1071, Pet. 26; No. 1073, Pet. 28); the petitioners were there represented by the same counsel who prepared the petitions for certiorari filed in this Court, and the questions presented by the petitions are substantially alike. In these circumstances we have undertaken to deal with the three petitions in a single opposing brief, although searches of different automobiles are involved.

No. 1040

The petitioner Whitney was charged in a criminal information filed in the District Court of the

United States for the Northern District of New York with the possession and transportation of five quarts of Scotch whiskey in violation of the National Prohibition Act. (R. 3, 4.) The information was based upon the finding of the liquor in an automobile driven by the defendants, upon a search thereof by troopers of the State of New York. (R. 21, 22, 23.) Prior to trial the defendant moved for a suppression of evidence and for an order directing the return to him of the seized property, on the grounds that the property was seized for violation of the National Prohibition Act by the State troopers acting under a general understanding or arrangement with the Federal prohibition authorities; that the search and seizure were without a search warrant and without probable cause, and therefore in violation of the defendant's rights under the Fourth Amendment; and that the use in evidence of the property seized would be repugnant to the Fifth Amendment. (R. 5–8.) After taking proof the District Court denied the motion, holding that the constitutional claims were not well taken as regards the action of the troopers as State officers and that the proof failed to show any such cooperation between the Federal and State authorities as would make the State troopers agents of the Federal Government. (R. 16–18.) Objections on the same grounds to the introduction by the Government at the trial of testimony regarding the search and seizure were overruled (R. 19), and the

defendant was convicted on both counts (R. 41) and sentenced to pay a fine of $500 (R. 42).

No. 1071

In this case an indictment in four counts was returned in the same Federal court against the petitioners Gambino and Lima. The first count charged a conspiracy to violate the National Prohibition Act and customs laws by importing into the United States and transporting in and through the Northern District of New York a large quantity of intoxicating liquors fit for beverage purposes and containing more than one-half of one per centum of alcohol. As an overt act in furtherance of said conspiracy, the indictment alleged that the defendants had gone into Canada in a Buick roadster and had obtained a load of Canadian ale which they had imported into and transported within the said Northern District. The second, third, and fourth counts, respectively, charged the substantive offenses of importing intoxicating liquor from Canada into the said judicial district, and of possessing and transporting intoxicating liquor within said district "contrary to the form of the statute in such case made and provided and particularly Section 3, Title 2, of the National Prohibition Act." (R. 19–23.)

As in Case No. 1040, the charges against the defendants were based upon the finding by troopers of the State of New York of the intoxicating liquor in an automobile in which it had been transported

by the defendants. (R. 28–31.) There was likewise a motion in advance of trial for the suppression of evidence and for an order directing the return of the seized property. The motion in this case, however, failed to allege that in making the seizure the State officers were acting in pursuance of a general understanding or arrangement with the Federal authorities. It asserted only that the search and seizure were made without a warrant and without probable cause, in violation of the defendants' rights under the Fourth, Fifth, and Sixth Amendments, and that the seized property and persons of the defendants were turned over by the State officers to Federal officials for prosecution in the Federal court. (R. 23–26.) The motion was overruled. (R. 27.) No objection was made by the defendants at the trial to the introduction of evidence relating to the search and seizure until the Government's fifth and final witness had taken the stand. The objections then interposed and overruled were to testimony of the Government's chemist regarding the contents of a sample of the seized liquor, the ground of objection being that the search and seizure by which the State officers had procured the sample were without warrant of law, State or Federal, and in violation of the defendants' rights under the Fourth, Fifth, and Sixth Amendments. (R. 50, 51, 61.) The defendants offered no evidence, but at the close of the Government's case moved for a directed verdict on each count. The motion was sustained as to the second, or importa-

tion, count, but was overruled as to the remaining three counts. (R. 64–66.) The jury returned a verdict of guilty against both defendants upon the first, third, and fourth counts (R. 81), whereupon each defendant was sentenced to confinement in the Federal penitentiary at Atlanta, Georgia, for one year and a day, and to pay a fine of $10,000. Regarding the fine, the court in rendering judgment said (R. 82):

> Now, if they have any property I would not fine them ten thousand dollars, if they have any property that would prevent them from taking the pauper's oath. That is on the conspiracy charge. Nothing on either of the other two charges. The confinement on account of the fine at the Penitentiary, Atlanta, Georgia, to be after the expiration of the prisoner's sentence.

No. 1073

This was a criminal information filed in the same District Court charging the petitioner Ostrander with the possession and transportation of 10 half barrels of beer for intoxicating beverage purposes. (R. 3, 4.) As in the two preceding cases, the prosecution was based upon the finding of the intoxicating liquor by troopers of the State of New York in an automobile driven by the defendant. Here, also, a preliminary motion was filed to restrain the use of evidence and for an order directing the return of the seized property. The grounds of the motion were that the search and seizure by the State officers

were without warrant or authority in law and in violation of the defendant's rights under the Fourth and Fifth Amendments, and that—

> the seized property and person of the defendant were turned over by the said State Troopers to Federal officers under a general arrangement or understanding between the Federal Prohibition Agents and New York State Policemen whereby said Policemen customarily make such arrests, searches and seizures and turn the person arrested and the property seized over to Federal Prohibition Agents for prosecution in United States District Court. (R. 6–8.)

After hearing the testimony of the State officers as to the instructions under which they were acting in making the search and seizure and as to the circumstances under which the search and seizure were made (R. 9–23), the court denied the motion (R. 24, 25). Similar objections at the trial to evidence offered by the Government relating to the search and seizure were overruled. (R. 27, 28, 29, 30, 35.) The trial resulted in a verdict of guilty upon both counts (R. 47) and the defendant was sentenced to pay a fine of $500 (R. 48).

As hereinbefore stated, the judgment in each of the foregoing cases was affirmed by the Circuit Court of Appeals without opinion. This Court is now asked to grant writs of certiorari in these cases upon the following grounds:

1. That in making the searches and seizures the State officers were acting as agents of the United

States and were therefore subject to the restrictions and limitations of the Fourth Amendment.

2. That the searches and seizures were made without search warrants and without probable cause, and that in denying the petitioners' motions for a suppression of evidence and for the return of seized property, as well as in overruling their objections to the introduction of evidence relating to the searches and seizures, the District Court denied to them rights guaranteed by the Fourth, Fifth, and Sixth Amendments.

ARGUMENT

I

THE SEARCHES AND SEIZURES WERE MADE UPON PROBABLE CAUSE

In the *Whitney case* (No. 1040) the evidence showed that on April 17, 1925, Troopers Krass and Drumm were on the highway between Mount Upton and Morris near Gilbertville, in the State of New York, looking for a Buick coupé, License No. 6J–43–66, driven by the defendant, upon the complaint of a private citizen that the defendant was transporting intoxicating liquor in said machine. (R. 19, 22, 31.) Upon the approach of the defendant in the car bearing the specified license number, the officers stopped him and asked for his license and whether he had any liquor in the car. The defendant denied that he had any liquor and the officers asked him whether they might look in the car. The defendant then got out

and opened up the back compartment of the coupé, disclosing a handbag in which he said there were some personal belongings. The officers thereuopn informed him that they had information concerning his activities and asked whether he would show them what he had in the grip. He replied that he had five quarts of liquor (R. 20, 32), and then unstrapped and opened the grip, which was not locked, revealing five quarts of liquor therein. The officers then placed him under arrest and took the car and liquor into custody. (R. 21, 22, 25, 32, 33.)

Aside from the fact, disclosed by the foregoing evidence, that the presence of the liquor in the defendant's automobile was made known to the officers without any actual search by them, it will be noted that in stopping the car and questioning the defendant the officers were acting upon specific information that the defendant was illegally transporting liquor in said automobile. In *Carroll* v. *United States*, 267 U. S. 132, 158, this Court very clearly intimated its opinion that to justify a search of an automobile for contraband liquor it is not essential that the officer be apprised by the evidence of his senses that the liquor is contained in said vehicle, but that the probable cause for belief necessary to authorize the search may have been acquired by the officer from information previously received by him. And in the same case (p. 159) it cited with approval the following cases in which searches of automobiles solely upon information

conveyed to the officers that the automobiles were being used for the illegal transportation of liquor, were sustained: *Lambert* v. *United States* (C. C. A., 9th), 282 Fed. 413; *Milam* v. *United States* (C. C. A., 4th), 296 Fed. 629; *Ash.* v. *United States* (C. C. A., 4th), 299 Fed. 277.

In the *Gambino case* (No. 1071) Trooper Carroll testified for the Government that on August 1, 1925, while he and Trooper Travis were patrolling the Messena-Hogansburg road in a Ford car they met the defendants Gambino and Lima driving toward Messena in a Buick roadster; that the officers observed that the license plate of the defendants' car was from the central part of the State and that the rear end of the car "hung pretty low" (R. 28); that the witness had been stationed along the northern border for more than three years and had considerable experience with cars transporting liquors, and that "cars loaded or hanging that way have usually been loaded with booze coming from the border"; that the troopers turned their car and followed the defendants' car to Rayno's Garage in the village of Messena, where it stopped; that after asking for and being shown Gambino's registration card, the witness asked him what he had in his car and was told to find out; that the witness then asked Gambino for the key, but the request was refused; that the witness thereupon shook the end of the car and heard bottles rattle (R. 29, 38, 39); that the reputation in that section of Rayno, the proprietor of the garage, was that he was a bootlegger; that

the defendants and the Buick car were taken to the police station in Messena, where the witness again asked for the key and was told to go ahead and find it; that the witness then found the key in the left side pocket of the car, and opening the rear end of the defendants' car found therein fourteen cases of Canadian ale (R. 31). On motion of the defendants, the court struck out that part of the testimony which described the contents of the bottles as Canadian ale and refused to permit the witness to describe the labels on the bottles, on the ground that the labels themselves were the best evidence of that. (R. 31.) Later, however, the Government was permitted to show by another witness that at the time of its seizure the Buick roadster contained 336 bottles of Canadian ale. (R. 46.) The testimony of Trooper Carroll was corroborated by that of Trooper Travis, who additionally testified that Hogansburg was on the border line of Canada fourteen miles from Messena. (R. 34.)

It is submitted that where, as in this case, experienced officers patrolling a highway in the vicinity of the Canadian border observe a heavily loaded automobile proceeding from the direction of the border stop at the place of a well-known bootlegger and before any search or arrest is made discover that the load is contained in bottles, they have probable cause for belief that the automobile is being used for the illegal transportation of intoxicating liquor.

In the *Ostrander case* (No. 1073) Trooper Deveans, called as a witness for the Government on the hearing of the preliminary motion to suppress evidence, testified that on May 14, 1925, he was patrolling the highway between Utica and Rome; that about midway between those two points he passed the defendant, who was driving a Dodge truck very slowly up hill; that one side of the truck "was pretty well down on the 'X' "; that the witness drove down to the foot of the hill and then turned, drove back, and stopped the defendant as he reached the top of the hill; that the witness asked the defendant for his chauffeur's license, and as the defendant reached to get it from an inside pocket he exposed a revolver carried by him in a holster; that upon the request of the witness the defendant handed over the revolver to him and showed him a permit authorizing the defendant to carry it. (R. 9, 10.) In the language of the record, the witness further testified (R. 10):

> I asked him what the reasons were for carrying the gun, and he claimed or said to me that his father was held up by hijackers east of Utica, and he carried this gun for that purpose, that he wasn't going to be held up; and then I asked him what he had on the truck and he said "beer." I says, "What kind of beer?" and he said "Good beer." I said, "Where did you get it?" and he said, "In Rome." And then I went back of the truck and only a small cardboard or cardboards on the back of the window in the rear

> of the truck, and I said, "What have you got it in; barrels?" He said "Yes." I said, "How many?" and he said "Ten halves," and I looked in and noticed ten half barrels of beer.

At the trial the foregoing testimony was in substance repeated by Trooper Deveans, who additionally stated that he was accompanied at the time by Trooper Greeb; that when the defendant said he had beer on the truck the witness told him to turn around and drive back to the barracks; that Greeb rode back with the defendant to the barracks and the witness followed on a motor cycle; that the witness thereafter arraigned the defendant before Commissioner Wallace at Canastota, and the first sergeant notified the Federal officers to come for the truck and the beer. (R. 26, 27.) Deveans's testimony was fully supported by that of Trooper Greeb. (R. 28, 29.)

Even upon the assumption that the officers who made the seizure in this case were Federal agents, they were also charged with duties under the State law. Whether they had authority under that law to stop the defendant and ask for his chauffeur's license is not a matter of Federal cognizance. Before addressing any inquiry to the defendant to ascertain what he had on the truck, the officers discovered that he carried a revolver in a holster and that he did so to protect himself against "hijackers"—that is, persons who make it a business of robbing vehicles of intoxicating liquor. It can

not be doubted that with this information in their possession the officers, even as Federal agents, were warranted in asking the defendant what he had on his truck, and that his answer that it was "good beer" justified them in taking him and the truck and its contents into custody. The findings of the trial court, affirmed by the Circuit Court of Appeals, that probable cause existed, have support in the record and should not be disturbed.

II

THE STATE OFFICERS WERE NOT AGENTS OF THE UNITED STATES

As the record establishes the existence of probable cause, the question whether the searches were Federal and governed by the Fourth Amendment, as applied to a search without probable cause, may not be reached, but it will nevertheless be discussed.

In the evident realization that the Fourth Amendment applies only to the Federal Government and its agencies (*Twining* v. *New Jersey*, 211 U. S. 78, 92; *Weeks* v. *United States*, 232 U. S. 383, 398; *Burdeau* v. *McDowell*, 256 U. S. 465, 475), the petitioner Whitney (Case No. 1040) endeavored in the District Court to establish, by examination of the State troopers, that in making the search and seizure those officers were acting in pursuance of a general arrangement or understanding between the State and Federal authorities that the State officers would aid the Federal officers in enforcing the Federal laws relating to the traffic in

intoxicating liquor, the theory being that if such an arrangement or understanding could be shown, the State troopers would be held to have acted as Federal agents. The answers elicited failed to disclose any such arrangement or understanding. They showed only that the troopers had proceeded under the instructions of their superiors, that they should be on the lookout for vehicles transporting intoxicating liquors in violation of the Federal law, and that whenever such violations were discovered by them they should take the offenders and the liquor and transporting vehicles into custody, arraign the offenders under the Federal law before a United States Commissioner, and turn the seized property over to the proper Federal officers. (No. 1040, R. 8–11.) There was no proof whatever to support the claim now advanced by petitioner that in making the search and seizure the State troopers were acting under the authority conferred upon "any officer of the law" by Section 26 of the National Prohibition Act. On the contrary, as above indicated, the testimony was that the troopers were acting solely by direction of the State authorities from whom they received their orders.

It appearing, therefore, that no Federal officer or agent had participated in the search, seizure, and arrest made by the State officers, the District Court was under no obligation to inquire into the legality of these acts of the State officers.

McGrew v. *United States* (C. C. A., 9th), 281 Fed. 809, 811.

Coates v. *United States* (C. C. A., 4th), 290 Fed. 134, 135.

Hirata v. *United States* (C. C. A., 9th), 290 Fed. 197, 198.

Robinson v. *United States* (C. C. A., 9th), 292 Fed. 683, 684–685.

Riggs v. *United States* (C. C. A., 4th), 299 Fed. 273, 274.

Nunn v. *United States* (C. C. A., 9th), 4 F. (2d) 380, 381.

Schroeder v. *United States* (C. C. A., 2nd), 7 F. (2d) 60, 62.

Elam v. *United States* (C. C. A., 8th), 7 F. (2d) 887, 888.

See *Byars* v. *United States*, No. 72, Oct. Term, 1926; decided by this Court January 3, 1927.

There was no proof in either the *Gambino* or the *Ostrander case* that the State officers were acting as Federal agents when making the search and seizure. The only evidence upon the point in the *Gambino case* was a statement by Trooper Carroll in a deposition filed by the Government in opposition to the motion to suppress evidence. After describing therein the circumstances under which he and Trooper Travis had made the search and seizure, Trooper Carroll stated:

> Deponent further says that at the time there were no Federal officers present, and that they were not working in conjunction with Federal Officers. (No. 1071, R. 28.)

In the *Ostrander case*, following a lengthy cross-examination of the Government's witness, Trooper Deveans, to bring out the practice followed by the

State troopers when violations of the National Prohibition Act were discovered by them, it was stipulated between counsel that where arrests were made by the State troopers for alleged violations of the National Prohibition Act those officers appeared against the offender before the United States Commissioner and the man was held for prosecution by the District Attorney's office. (No. 1073, R. 23, 24.) It is submitted that these record references fall short of establishing that any Federal agency was involved in the searches and seizures made in these cases unless the fact that the State officials direct the State police to make such seizures and arrests and turn the evidence over to Federal authorities is enough in itself to make the search a Federal one.

CONCLUSION

The records in these cases disclose no ground for the application of the constitutional provisions relied upon by the petitioners. They show, furthermore, that even if applicable, those provisions were not infringed. The petitions should therefore be denied.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

MABEL WALKER WILLEBRANDT,
Assistant Attorney General.

JOHN J. BYRNE,
Attorney.

MAY, 1927.

○

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
The statutes applicable	2
Statement	3
Summary of argument	7
Argument:	
I. State officers, acting independently, are not agents of the United States; and if they obtained evidence illegally, it was nevertheless admissible in the prosecution in a Federal court	9
II. There was probable cause for the search	14
III. The evidence was sufficient upon the conspiracy count	16
IV. Evidence of Frank Rayno's reputation was not improperly admitted and, if so, was not prejudicial	22
V. Evidence that petitioners were armed was properly admitted	25
VI. The charge was not improper as to Lima	27
Conclusion	28

CITATIONS

Cases:

Adams v. *New York*, 192 U. S. 585	14
Apollon, The, 9 Wheat, 362	14, 24
Burdeau v. *McDowell*, 256 U. S. 465	13, 14
Burkhardt v. *United States*, 13 F. (2d) 841	17
Byars v. *United States*, 273 U. S. 28	13
Carroll v. *United States*, 267 U. S. 132	15, 17, 24
Clark v. *United States*, 4 F. (2d) 382	20
Clune v. *United States*, 159 U. S. 590	26
Coates v. *United States*, 290 Fed. 134	14
Dodge v. *United States*, 272 U. S. 530	12
Elam v. *United States*, 7 F. (2d) 887	14
Fisher v. *United States*, 2 F. (2d) 843	22
Gardner v. *Preston*, 2 Day (Conn.) 205	17
Goukler v. *United States*, 294 Fed. 274	21
Hill v. *United States*, 12 F. (2d) 504	21
Jiancle v. *United States*, 299 Fed. 496	20
Keith v. *United States*, 11 F. (2d) 933	17

65017—27——1

Cases—Continued. Page

Louisville Trust Co. v. *Louisville, New Albany & Chicago Ry. Co.*, 174 U. S. 674 18

Mechanics Bank of Alexandria v. *Bank of Columbia*, 5 Wheat. 326 10

Murry v. *United States*, 282 Fed. 617 20

McGrew v. *United States*, 281 Fed. 809 14

McGuire v. *United States*, 273 U. S. 95 14

Ray of Block Island, The, 7 F. (2d) 189 11

Ray of Block Island, The, 11 F. (2d) 522 12

Robinson v. *United States*, 292 Fed. 683 13

Schroeder v. *United States*, 7 F. (2d) 60 14

Shook v. *United States*, 10 F. (2d) 151 22

Simpson v. *United States*, 11 F. (2d) 591 21

Stafford v. *United States*, 300 Fed. 537 19

Thiede v. *Utah*, 159 U. S. 510 26

Twining v. *New Jersey*, 211 U. S. 78 14

United States v. *Lee*, No. 752, October Term, 1926, decided May 31, 1927 15

United States v. *Loomis*, 297 Fed. 359 11

United States v. *Story*, 294 Fed. 517 11

Weeks v. *United States*, 232 U. S. 383 13

Williamson v. *United States*, 207 U. S. 425 26

Windsor v. *United States*, 286 Fed. 51 19

Statutes:

McKinney's Consolidated Laws of New York, Book 39, Section 1897 26

National Prohibition Act (Act of October 28, 1919, c. 85, 41 Stat. 305, 315), Title II, Section 26 (U. S. C., Title 27, Section 40) 3

Penal Code, Section 37 (U. S. C., Title 18, Section 88) 2

Text Book:

Mechem on Agency, 2nd Ed., Section 285 10

In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 226

ROSARIO GAMBINO AND JOSEPH LIMA, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No opinion was rendered by either court below, the judgment of the District Court being affirmed *per curiam*. (R. 60; 16 F. (2d) 1016.)

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 28, 1927. (R. 61.) Petition for certiorari was filed April 20, 1927, and granted May 31, 1927 (R. 61), under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the state officers were acting as Federal agents in the enforcement of Federal Customs or Prohibition laws and in consequence were within the purview of the Fourth and Fifth Amendments to the Constitution of the United States.

2. Whether there was probable cause to search petitioners' automobile.

3. Whether the evidence was sufficient to sustain a conviction for conspiracy.

4. Whether evidence that the proprietor of the garage in front of which the seizure was made was reputed to be a bootlegger was improperly admitted on the question of probable cause for search of the car.

5. Whether evidence of the fact that petitioners were armed should have been excluded because they had permits to carry weapons.

6. Whether the trial court erred in part of the charge to the jury.

THE STATUTES APPLICABLE

Sentence was imposed upon the count based upon Section 37 of the Penal Code (U. S. C., Title 18, Sec. 88), which reads:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties

> to such conspiracy shall be fined * * * or imprisoned * * *.

It is claimed that the state officers were acting under authority of Section 26, Title II, of the National Prohibition Act (U. S. C., Title 27, Sec. 40), which, so far as pertinent here, provides:

> When the commissioner, his assistants, inspectors, *or any officer of the law* shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. * * * (Italics ours.)

STATEMENT

The first count of the indictment (R. 12) charged that petitioners conspired to violate the National Prohibition Act and customs laws by importing into the United States and transporting through the Northern District of New York large quantities of intoxicating liquor containing more than one-half of one per cent of alcohol and fit for beverage purposes; that pursuant thereto petitioners committed the overt act of transporting a load of Canadian ale in a Buick roadster from the Canadian boundary line into the State of New York to the place of their apprehension at Massena in the Northern District. The second, third, and fourth counts, respectively, charged the substantive offenses of import-

ing, possessing, and transporting intoxicating liquor. (R. 13, 14.)

On October 27, 1924, a motion was made to restrain the use of evidence "unlawfully obtained" through a false arrest and an illegal search and seizure of petitioners' property by New York State Troopers. (R. 14–16.) The record does not disclose any ruling thereon.

On May 15, 1925, petitioners again moved for an order restraining the use of evidence "unlawfully obtained as aforesaid," and for "the return of property unlawfully seized, as aforesaid." (R. 16.) They then objected to the filing of an answering affidavit made by one of the State Troopers because the motions had been determined by the trial court on October 27, 1924. The court overruled both the motion and the objection. (R. 16.) Thereafter a jury was impaneled. (R. 17.)

The arresting officers were State Troopers for the State of New York, Trooper Carroll having been stationed along the Canadian border in that capacity for three years and eight months and having had considerable experience with cars transporting liquor (R. 18), while Trooper Travis had eighteen months of similar experience on the Canadian border (R. 22). It was shown that the village of Hogansburg is on the border-line of Canada, fourteen miles from the village of Massena via the Massena-Hogansburg road. (R. 22.)

While the arresting officers were traveling north on the Massena-Hogansburg road at about one p. m.

on August 1, 1924, they met the petitioners traveling toward Massena from the direction of Hogansburg in a Buick roadster. The two cars passed each other at a point about three miles north of Massena (which would be about eleven miles from the Canadian border). The attention of the officers was attracted to the fact that the rear end of the Buick "hung pretty low"; that it seemed to be heavily loaded; and that its license was from the central part of the State. (R. 17, 22.)

With these observations, the officers turned and followed the Buick to Rayno's Garage in the village of Massena, where it stopped. There, according to Trooper Carroll (R. 18), Lima walked toward the garage and Travis followed him. According to the witness Travis (R. 30), Lima jumped out of the Buick and ran inside the garage, where Travis followed and brought him back. While this occurred Carroll approached the Buick and, upon request therefor, was shown Gambino's registration card. When he was asked what was in the car, Gambino told him to find out. However, when the witness requested the key to the rear compartment, Gambino refused to produce it. (R. 18.) Carroll then shook the car, heard the bottles, and asked Gambino how many cases he had. Again Gambino told him to find out. (R. 18.) Just prior to leaving the vicinity of the garage Lima said he "would not drive the car" (R. 24), and Gambino wanted to know if he could not "fix it up" (R. 24).

Thereupon Carroll drove Lima to the police station at Massena in the Buick car while Travis and Gambino rode in the officers' car. (R. 19, 30.) Upon arrival at the police station Carroll again asked for the key and was told to go ahead and find it. (R. 19.) The officer then found the key in the left side pocket of the car and, opening the rear compartment, found fourteen cases of Canadian ale (R. 19), or a total of three hundred thirty-six bottles (R. 31). After this discovery Carroll asked Lima where they got the ale. Lima did not say, but he "did say they came from Hogansburg." (R. 18.)

Both petitioners, at the time of the arrest, stated that they lived in Utica. (R. 21, 34.) When asked where they got the load, neither answered. (R. 21.)

Search of petitioners' persons at the police station revealed that each was armed (R. 21), Lima with a .25 caliber Colt automatic (R. 21) and Gambino with a .32 caliber Dreys revolver (R. 31). Each gun was loaded. (R.21, 30.) Each petitioner had a permit to carry a gun. (R. 27.)

The Buick roadster, the Canadian ale, and the guns were turned over by the State Troopers to a deputy collector and inspector of the Customs at the police station at Massena. (R. 31.) This was after the car had been completely unloaded. (R. 28.)

Petitioners made no objection to the introduction of evidence relating to the discovery and seizure of the liquor on the grounds of an illegal search until the Government's final witness had taken the stand.

He was a Government chemist whose sole testimony related to the alcoholic content of the liquor. (R. 34, 35, 42–44.) Against this evidence, it was objected that the samples analyzed had been procured without any warrant or other authority in violation of petitioners' rights under the Fourth, Fifth, and Sixth Amendments, and that the action of the arresting officers was not authorized by Section 26, Title II, of the National Prohibition Act nor by any state law. (R. 34, 35, 42.) The objection was overruled. (R. 42.)

Petitioners offered no evidence. At the close of the Government's case they moved for a directed verdict upon the alleged insufficiency of the evidence and the alleged illegality of the search and seizure. The motion was granted as to the second, or importation count, but otherwise overruled. (R. 45, 46.) The jury found against both petitioners on the remaining counts (R. 55), and each was sentenced to confinement in the penitentiary at Atlanta, Georgia, for one year and one day and to pay a fine of $10,000 (R. 55, 56). Judgment was affirmed by the Circuit Court of Appeals.

SUMMARY OF ARGUMENT

There is a total absence of facts to establish a Federal agency on the part of the state officers. The words "any officer of the law" in Section 26, Title II, of the National Prohibition Act do not so authorize the state officers to seize vehicles that they become, *ex lege*, agents of the United States.

Since state officers do not themselves have the capacity to violate the Fourth and Fifth Amendments, the adoption of the seizure, well after it had been completed, did not constitute a ratification by the United States of an unconstitutional act.

There being no agency—either in fact, by statute or by ratification—the case falls within the rule that evidence illegally acquired by others than Government officers does not necessarily violate the Constitution nor affect the admissibility of such evidence in a Federal court. The Eighteenth Amendment created no new civil rights and, therefore, did not extend the scope of the first ten Amendments.

Though there was no need to inquire into the legality of the acts of the state officers, there was nevertheless probable cause for the search, considering the close proximity to the Canadian border and the suspicious acts and utterances of petitioners, viewed in the light of long experience by the arresting officers. The shaking of the car, while technically a trespass, was not an unreasonable search, if, in fact, it was a search at all.

There was sufficient evidence to go to the jury upon the issue of conspiracy. Possession of liquor and of the guns, with the other facts and circumstances shown, permitted an inference that these men were acting in the furtherance of a common design. The attitude of neither reflected that one of them was an innocent passenger. The weight of authority among the lower Federal courts sustains the sufficiency of the evidence in this case. The

consensus of opinion among these courts is that when two men are caught doing a thing together, there is support for finding that they agreed to do that thing together. What they were doing and what they agreed to do are matters for the jury.

The reputation as a bootlegger of the proprietor of the garage at which the car stopped was admissible upon the question of probable cause to make the search.

The guns, seized at the time of the arrest, might have been implements of the crime, and the question of their relation to the transportation of the liquor was for the jury. On the issue of conspiracy, evidence of the possession of these guns was clearly admissible. That they were carried under a state permit might affect the weight of such testimony, but not its admissibility.

The charge as to Lima was fair and clearly presented the issue to the jury. That portion objected to was given in a résumé and in explanation of the theory that Lima was but an innocent passenger. So given it was not prejudicial.

ARGUMENT

I

STATE OFFICERS, ACTING INDEPENDENTLY, ARE NOT AGENTS OF THE UNITED STATES; AND IF THEY OBTAINED EVIDENCE ILLEGALLY, IT WAS NEVERTHELESS ADMISSIBLE IN THE PROSECUTION IN A FEDERAL COURT

There is no evidence whatever to show cooperation between the State Troopers who made the

other officers of the United States." That decision also noted that other provisions of Section 26 for approval of bonds by the seizing officer on release of the seized vehicle seemed inappropriate to other than officers of the United States.

The Circuit Court of Appeals for the First Circuit agreed with the conclusion of the District Court—that Section 26 confers authority only upon officers of the United States. (*The Ray of Block Island*, 11 F. (2d) 522.) Upon a writ of certiorari granted by this Court, the judgment of the Circuit Court of Appeals for the First Circuit was affirmed. (*Dodge* v. *United States*, 272 U. S. 530.) While the opinion of this Court did not specifically decide whether "any officer of the law" included others than Federal officers, this Court did hold that the seizure by local officers could be adopted by the United States. This holding clearly indicates that the original seizure by such officers had not been previously authorized by Section 26, for an act so previously authorized would require no subsequent adoption.

All that was done by officers of the United States in this case was done long after the seizure had been completed. After the Buick roadster had been unloaded at the police station in the village of Massena (R. 28) the cargo and the guns were turned over by the arresting officers to an officer of the customs. The acceptance thereof by this Government officer was not an act which deprived petitioners of any right under the Fourth and Fifth

Amendments. The Government might, with equal propriety, have allowed the seized articles to remain with the state officers and later secured their production by a *subpœna duces tecum*. Neither course would have encountered constitutional objection. (*Burdeau* v. *McDowell*, 256 U. S. 465, 475.) Certainly the acceptance of this property by the Government officer was not a ratification of an unconstitutional act, for the arresting officers, acting independently of Federal agents, did not have the capacity to commit an act violative of the Fourth and Fifth Amendments. It being well established that these Amendments do not apply to state officers, the act of the Government officers, if it be a ratification of anything, must be considered as an adoption of an act constitutionally unobjectionable. (*Robinson* v. *United States* (C. C. A. 9th), 292 Fed. 683.)

Since there was no Federal cooperation in the making of this search and seizure, the rule announced in *Byars* v. *United States*, 273 U. S. 28, does not apply. It has been pointed out that no Federal agency was created by Section 26, Title II, of the National Prohibition Act. It appears, therefore, that this case falls within the rule, long regarded as settled, that the use by prosecuting officers of evidence illegally acquired by others than Government officers does not necessarily violate the Constitution of the United States nor affect the admissibility of such evidence in a Federal court. (*Weeks* v. *United States*, 232 U. S. 383, 395; *Adams*

fied in believing his suspicions were confirmed and that he then had probable cause for the search.

Considering that the search in this case occurred much nearer a troublesome frontier than that in *Carroll* v. *United States*, 267 U. S. 132, it is submitted that there was even a greater degree of probable cause than that which existed at Grand Rapids, Michigan—152 miles from the customs barrier.

III

THE EVIDENCE WAS SUFFICIENT UPON THE CONSPIRACY COUNT

It is urged that the trial court erred in denying the motion of petitioners to direct a verdict of not guilty upon the ground that the evidence was insufficient. (R. 44, 45.) At the close of the Government's case the defendants rested and filed their motion for a directed verdict upon each count of the indictment. The motion was sustained upon the importation count. (R. 45.) Since petitioners were sentenced (R. 55, 56) only upon the first, or conspiracy count, and since the sentence exceeded that which could have been imposed upon the third and fourth counts of the indictment, it will be necessary only to consider whether the evidence was sufficient to go to the jury upon the question of conspiracy.

A cardinal principle for determination of the sufficiency of the evidence is that the evidence is sufficient if it shows such concert of action in the commission of the unlawful act or other facts and

circumstances from which the natural inference arises that the unlawful act was in furtherance of a common design. (See *Keith* v. *United States* (C. C. A., 6th), 11 F. (2d) 933; *Burkhardt* v. *United States* (C. C. A., 6th), 13 F. (2d) 841.) These facts and circumstances from which such natural inference may arise should be viewed, when considering their suffiiency, in the light of the rule taken from the common law. In *Gardner* v. *Preston*, 2 Day (Conn.) 205, 209, it is said:

> The greater the secrecy that is observed, relative to the object of such concurrence, and the more apparent the similarity of the means employed to effect it, the stronger is the evidence of conspiracy. (1 East P. C. 97.)

The facts and circumstances in this case, it is submitted, are sufficient to warrant a conclusion of a common design to transport a quantity of well-hidden liquor. It is entirely proper to infer that the purpose for their being armed was common to the protection of the liquor they carried. The two men were both from Utica. (R. 21, 34.) They both rode together from Hogansburg (R. 18) on the Canadian frontier (R. 22). The court and the jury can judicially know that the vicinity is one where the smuggling and transportation of liquor from Canada are frequent occurrences. (*Carroll* v. *United States*, 267 U. S. 132, 160.) The key to the compartment was hidden, apparently for the purpose of facilitating a defense for the man who was

not driving at the time a search might take place. Furthermore, the conduct of each of these men, considered separately, indicated guilty knowledge of the contraband liquor. Gambino tried to "fix it up." (R. 24.) Lima jumped out of the Buick and ran inside the garage, from which place he was brought back by one of the officers. (R. 30.) Gambino brazenly told the other officer to find out for himself what was in the car, but refused to produce the key to the rear compartment. (R. 18.) Upon their arrival at the police station, this same course of conduct was pursued by the petitioners.

It is urged that Lima may have been but a passenger in the car and if so was not guilty of a conspiracy. However, Lima's attitude was anything but that of an innocent passenger. He was given ample opportunity to indicate his innocence, if true, when Trooper Carroll asked him where they got the ale. He did not say, but he "did say they came from Hogansburg." (R. 18.) Clearly this conduct on the part of Lima, after the ale had been discovered, would not comport with the conduct one might expect from an innocent passenger without knowledge of the liquor in the car. Since "human nature is something whose action can never be ignored in the courts" (*Louisville Trust Co. v. Louisville, New Albany & Chicago Ry. Co.*, 174 U. S. 674, 688), the jury were entitled to draw from his actions the inference that he was not a mere passenger. The elements of improbability are too strong to be disregarded. Furthermore, both petitioners

were asked where they got the load and neither answered.

The sufficiency of the evidence to support a charge of conspiracy to transport liquor where two men are arrested in an automobile has been passed upon by several of the Circuit Courts of Appeals. Petitioners rely on the decision of the Circuit Court of Appeals for the Sixth Circuit in *Stafford* v. *United States,* 300 Fed. 537. Here two men were in a car loaded with liquor. When followed, they drove at about fifty-five miles an hour until they met with an accident. Then the driver of the car tried to run away, but the other defendant did not run. It was held that this was insufficient to sustain a verdict under Section 37 of the Penal Code, the court saying (p. 540), "The fact that he was riding in the car with Stafford is a suspicious circumstance, but suspicious circumstances do not constitute proof of guilt beyond a reasonable doubt." However, there is a distinction between the facts of this case and the facts of the *Stafford case.*

Considering the circumstances that, upon the approach of the officers, petitioner Lima tried to run away, the facts fall within the rule of *Windsor* v. *United States* (C. C. A., 6th), 286 Fed. 51. Here the evidence was that one man was driving a car which carried liquor and that the other man ran when the arrest was made. It was held that the evidence was sufficient to show a conspiracy. Thus, under the precise facts of this case, without consid-

ering the fact that both men were armed, the rule in the Sixth Circuit is in accord with the contention of the Government in this case. Furthermore, the rule in the Sixth Circuit in the *Stafford case* was modified in *Clark* v. *United States* (C. C. A., 6th), 4 F. (2d) 382, where the sufficiency of the evidence against the alleged passenger was challenged under the rule in the *Stafford case* and the court held *per curiam:*

> The jury might well have thought it insufficient; but, considering the elements of improbability in Ronaldi's story and conflicts between his story and that of Clark, we are not satisfied that there was error in submitting this issue to the jury.

Jianole v. *United States* (C. C. A., 8th), 299 Fed. 496, can be distinguished from the instant case. Nothing more was shown than that two men were in a car with liquor. It was not shown, as in this case, that both men were from the same city; that both came in the loaded car from a place where liquor might easily be secured, nor that both of the men were armed to protect, if necessary, the liquor they carried.

On the other hand, the weight of authority among the Circuit Courts of Appeals supports the view that the evidence was sufficient. Thus in *Murry* v. *United States* (C. C. A., 8th), 282 Fed. 617, the liquor car containing two men was chased for two or three miles and stopped only when one of the tires was punctured by a bullet. Yet the court

held that this was sufficient. And in *Hilt* v. *United States* (C. C. A., 5th), 12 F. (2d) 504, it was considered sufficient that the evidence disclosed that two men on a boat with liquor had, upon discovery, changed their course and attempted to escape. In this case the court said (p. 505):

> Proof of what conspirators do is usually in the nature of things the only proof available to the prosecution of what they agreed to do.

Goukler v. *United States* (C. C. A., 3rd), 294 Fed. 274, presents the situation of two men on a boat with liquor without the element of an attempted escape. This evidence was held sufficient to support a conspiracy count, it being pointed out (p. 276) that:

> Being on the boat under circumstances which might raise a valid inference of participation in the several crimes charged against them, their presence and the purpose of their presence were matters for the jury. It was also the province of the jury to determine from the evidence what the defendants were doing and whether they had conspired to do the thing they were caught doing.

In *Simpson* v. *United States* (C. C. A., 4th), 11 F. (2d) 591, it was said that there could be no question about the sufficiency of the evidence as to the driver of the car and his companion where the evidence against them consisted only of testimony that they were arrested together in possession of the liquor and that they had the day before been

seen talking together. In *Fisher* v. *United States* (C. C. A., 4th), 2 F. (2d) 843, 846, it was significantly said:

> It hardly need be said that a conspiracy is often proved by the overt act. The fact that two men are found together breaking into a bank is indubitable proof that they had agreed to commit the burglary.

Though not raised on a motion for directed verdict, a similar question was presented in *Shook* v. *United States* (C. C. A., 5th), 10 F. (2d) 151. It was there held that evidence that two men were in a car with liquor is sufficient proof of the *corpus delicti* to warrant the admission of statements made by each, since "evidence of the cooperation or concert of action of the accused in the possession and control of the liquor furnished support for a finding that they had agreed or conspired to do so."

IV

EVIDENCE OF FRANK RAYNO'S REPUTATION WAS NOT IMPROPERLY ADMITTED AND, IF SO, WAS NOT PREJUDICIAL

It is urged that the trial court erred in admitting evidence by Trooper Carroll that Frank Rayno had the reputation of being a big bootlegger, because Frank Rayno was a stranger to the case. Petitioners voluntarily stopped in front of Rayno's garage in the village of Massena (R. 18), and Trooper Carroll had known Rayno for about a year (R. 18).

The matters complained of arose in the following manner (R. 18, 19):

> Mr. BREED. Do you know what his reputation is up in that section with reference to bootlegging?
>
> The COURT. It has no bearing on any of the charges here.
>
> Mr. BREED. But their stopping at this garage.
>
> The COURT. Did he say the car stopped in front of Rayno's garage?
>
> Mr. BREED. Yes, sir, and one of them got out and started to go in and the other one was in the act of getting out.
>
> The COURT. It is admissible, not as to whether or not the defendants committed any of the crimes. As to those things, it is not competent and material at all, but it has a bearing on whether or not they had reasonable grounds to suspect that the automobile contained intoxicating liquors. So, on that ground and on that ground alone, the Jury will understand the objection is overruled.
>
> * * * * *
>
> The WITNESS. He has a reputation of being a big bootlegger.

The questions answered were then stricken at the request of Government counsel, and the following occurred (R. 19):

> Mr. BREED. Did you know at that time on August 1st, 1924, what Mr. Rayno's reputation was for bootlegging up in that section?

The court overruled objections, stating its reason for so doing as before.

> The WITNESS. He had the reputation of being a bootlegger.

Probable cause, according to the authorities reviewed in *Carroll* v. *United States*, 267 U. S. 132, 159–162, consists of a reasonable ground for belief based upon the facts and circumstances known to the arresting officers and *of which they had reasonably trustworthy information*. The view that "information" would justify probable cause indicates that hearsay evidence is admissible to establish probable cause. When a portion of the country and the smugglers who infest it are pertinent to the question of probable cause (*The Apollon*, 9 Wheat. 362, 374), certainly the man before whose garage petitioners voluntarily stopped is not such a stranger to the case that information concerning his activities is incompetent on the same question. And the information, having reached the proportions of a reputation, could scarcely be other than "reasonably trustworthy."

Furthermore, the ruling of the court made it plain to the jury that this testimony was not admissible, and was not to be considered by them, on the issue of guilt or innocence of the defendants. That this evidence was admitted for a limited purpose and for the court alone upon a question of law was further impressed upon the jury by withdrawing from them entirely the question of the legality

of the search and of probable cause therefor. In his charge the court said (R. 46):

> I may say also at the outset that there is no question for you to decide here as to whether these Defendants were lawfully stopped and apprehended and arrested and their automobile and its contents seized. That is a question of law which the Courts, supposedly trained in the law, are called upon to decide. It is not a question of any kind for the jury.

Though he reviewed the facts in the case in his charge (R. 49), the court refrained from any comment regarding Rayno's reputation. Obviously the jury understood from all of this that they were not to consider, on the question of guilt or innocence, the evidence of such reputation. In the light of the instructions given them, it is not to be supposed that they did so consider it.

V

EVIDENCE THAT PETITIONERS WERE ARMED WAS PROPERLY ADMITTED

It is claimed that testimony by the arresting officers was improperly admitted to show that a revolver and a pistol with cartridges for each were taken from both petitioners. It is argued that this evidence became inadmissible in view of the fact that it was developed on cross-examination that each of the petitioners had a permit from the State of New York to carry such a weap-

Obviously these men had procured permits to carry the weapons in order to avoid prosecution under the state laws. (See McKinney's Consolidated Laws of New York, Book 39, Section 1897.) Though their motive might have been to comply with the laws of the State of New York, it by no means follows that there was an entire absence of any other motive in carrying these weapons. That they were thus licensed to carry weapons might affect the weight of the testimony, but it could in no wise affect its admissibility.

Every fact which has a bearing on or a tendency to prove the ultimate fact in issue or to throw light upon the relation of the parties and their purpose may go before the jury. (*Thiede* v. *Utah*, 159 U. S. 510; *Clune* v. *United States*, 159 U. S. 590.) Great latitude is allowed in the reception of testimony revealing such circumstances. (*Williamson* v. *United States*, 207 U. S. 425.) It can not be seriously contended that, when two men are riding with a load of liquor, the fact that they are armed has no relation to the transportation of that liquor.

Petitioners claim that the admission of this evidence, however, was unduly harmful in view of the accentuating remarks by the trial court in his charge to the jury (R. 50)—

> that it could not be by a coincidence that two men from Utica could be up there in a car so near the Canadian line, driving from one place near the Canadian line on the way back towards Utica, each with a revolver loaded;

> that it could not be a coincidence, that it must have been pursuant to an agreement.

The remark attributed to the court, however, was not entirely as quoted. The record discloses (R. 50), that the paragraph containing the above excerpt was prefaced by a statement that "The government says by that proof it has established that * * *." In this form the statement of the trial court was harmless.

VI

THE CHARGE WAS NOT IMPROPER AS TO LIMA

Objection is made to that portion of the instructions wherein it was charged (R. 50):

> If that be so, then, as far as the Defendant Lima is concerned, he is not guilty of conspiracy, he is not guilty of any other offense if he was in entire innocence of the fact that there was anything unlawful in that car or that any crime was being committed, or that any conspiracy had been made.

It is urged that this charge inferentially amounted to a direction to find both of the defendants guilty unless the jury believed that Lima was innocent and in utter ignorance of any violation of the law.

The portion of the charge objected to was immediately preceded by a summary of the defendants' contentions as follows (R. 50):

> The Defendants contend that the evidence does not warrant any such inference. The Defendants say there were no bottles visible,

> that there is nothing to indicate that the one Defendant, Lima, had any knowledge that there were any bottles there, and had no knowledge that any law was being violated; that the evidence does not show but that he was a passenger; that he was there by accident, or that he was there without any reference to any crime and not in carrying out any agreement, and that he was there and that he was in the car an entirely innocent man and in utter ignorance of the fact that any law was being violated, or that there were any intoxicating liquors in the car.

It is difficult to see any objectionable features in this charge, particularly in view of the fact that the court had theretofore charged the jury that if they were satisfied beyond a reasonable doubt that there was an agreement and that these men were doing something in carrying out that agreement, they could return a verdict of guilty.

CONCLUSION

It is submitted that the judgment and sentence should be affirmed.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

MABEL WALKER WILLEBRANDT,
Assistant Attorney General.

NORMAN J. MORRISSON,
Attorney.

SEPTEMBER, 1927.

○

SUPREME COURT OF THE UNITED STATES.

No. 226.—October Term, 1927.

Rosario Gambino et al., Petitioners, *vs.* United States.	On Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[December 12, 1927.]

Mr. Justice Brandeis delivered the opinion of the Court.

On August 1, 1924, Gambino and Lima were arrested by two New York state troopers, near the Canadian border; their automobile (while occupied by Gambino and therefore within the protection accorded to his person) was searched without a warrant; and intoxicating liquor found therein was seized. They, the liquor and other property taken were immediately turned over to a federal deputy collector of customs for prosecution in the federal court for northern New York. There, the defendants were promptly indicted for conspiracy to import and transport liquor in violation of the National Prohibition Act. They moved seasonably, in advance of the trial and again later, for the suppression of the liquor as evidence and for its return, on the ground that the arrest, the search and the seizure were without a warrant and without probable cause, in violation of the Fourth, Fifth and Sixth Amendments of the Federal Constitution. The motion was denied; the evidence was introduced at the trial; the defendants were found guilty; and they were sentenced to fine and imprisonment. The Court of Appeals affirmed the judgment. Neither court delivered an opinion. This Court granted a writ of certiorari, 274 U. S. —.

The Government contends that the evidence was admissible, because there was probable cause, *Carroll* v. *United States*, 267 U. S. 132, 153, and also because it was not shown that the state troopers were, at the time of the arrest, search and seizure,

agents of the United States. The defendants contend that there was not probable cause and that the state troopers are to be deemed agents of the United States, because § 26 of Title II of the National Prohibition Act imposes the duty of arrest and seizure where liquor is being illegally transported, not only upon the Commissioner of Internal Revenue, his assistants and inspectors, but also upon "any officer of the law." We are of opinion on the facts, which it is unnecessary to detail, that there was not probable cause. We are also of opinion that the term "any officer of the law" used in § 26 refers only to federal officers, and that the troopers were not, at the time of the arrest and seizure, agents of the United States. Compare *Dodge* v. *United States*, 272 U. S. 530, 531.

But the National Prohibition Act, October 28, 1919, c. 85, Title II, § 2, 41 Stat. 305, 308, contemplated some cooperation between the state and the federal governments in the enforcement of the Act. Thus, § 2 made applicable the provisions of § 1014 of the Revised Statutes whereby state magistrates were authorized "agreeably to the usual mode of process against offenders in such State, and at the expense of the United States," to arrest and imprison, or bail, offenders against any law of the United States for trial before the federal court, and to require "recognizances of witnesses for their appearance to testify in the case." Section 2 also gave specific authority to the state magistrates to issue search warrants under the limitations fixed by the federal statutes. Act of June 15, 1917, c. 30, Title XI, 40 Stat. 217, 228. Evidence obtained through wrongful search and seizure by state officers who are cooperating with federal officials must be excluded. See *Flagg* v. *United States*, 233 Fed. 481, 483, approved in *Silverthorne* v. *United States*, 251 U. S. 385, 392. In *Byars* v. *United States*, 273 U. S. 28, 34, evidence obtained by state officers through search and seizure made without a warrant and without probable cause, but in the presence of a federal official, was held inadmissible. The question here is whether, although the state troopers were not agents of the United States, their relation to the federal prosecution was such as to require the exclusion of the evidence wrongfully obtained.

The Mullan-Gage law—the state prohibition act—had been repealed in 1923. Act of June 1, 1923, c. 871, 1923 N. Y. Laws, p. 1690. There is no suggestion that the defendants were com-

mitting, at the time of the arrest, search and seizure, any state offense; or that they had done so in the past; or that the troopers believed that they had. Unless the troopers were authorized to make the arrest, search and seizure because they were aiding in the enforcement of a law of the United States, their action would clearly have been wrongful even if they had had positive knowledge that the defendants were violating the federal law. No federal official was present at the search and seizure; and the defendants made no attempt to establish that the particular search and seizure was made in cooperation with federal officials. But facts of which we take judicial notice, compare *Tempel* v. *United States*, 248 U. S. 121, 130, make it clear that the state troopers believed that they were required by law to aid in enforcing the National Prohibition Act; and that they made this arrest, search and seizure, in the performance of that supposed duty, solely for the purpose of aiding in the federal prosecution.

In the memorandum filed by the Governor approving the Act which repealed the Mullan-Gage law, he declared that all peace officers, thus including state troopers, are required to aid in the enforcement of the federal law "with as much force and as much vigor as they would enforce any State law or local ordinance"; and that the repeal of the Mullan-Gage law should make no difference in their action, except that thereafter the peace officers must take the offender to the federal court for prosecution.[1] Aid so given was accepted and acted on by the federal officials.[2] It appears that one

[1]Memorandum filed with Assembly Bill, Introductory No. 1614, Printed No. 1817, p. 2. See also Messages of Jan. 2, 1924, N. Y. Leg. Doc., 147th Sess., 1924, No. 3, p. 40, and Jan. 7, 1925, N. Y. Leg. Doc., 148th Sess., 1925, No. 3, pp. 39-40; Report of the Department of State Police for 1924, N. Y. Leg. Doc., 148th Sess., 1925, No. 50, p. 13.

[2]Immediately after the repeal of the Mullan-Gage law the Federal Prohibition Director in New York City announced that he would call upon the Superintendent of State Troopers, the sheriff of each county, and every chief of police to aid in arresting violators of the National Prohibition Act. In February, 1924, he attended a conference of state and federal enforcement agencies at Albany, where he reiterated the need for cooperation. That arrests for violation of the Volstead Act in northern New York were commonly made by state troopers, during 1924, see testimony of federal prohibition agents in Hearings before the Committee on the Judiciary of the House of Representatives, 69th Cong., 2d Sess., on H. Res. 398 and H. Res. 415, pp. 37, 71, 79, 88, 100. For the part played by the New York City police in enforcement of the National Prohibition Act long after the repeal of the Mullan-Gage law, see

of the troopers who made the arrest and seizure here in question had been stationed at the Canadian border for eighteen months prior thereto, the greater part of that period being after the repeal of the Mullan-Gage law. It was also shown that immediately after the arrest and seizure, the defendants, their car and the liquor were, after they had been taken to the committing magistrate, turned over to the federal officers. In view of these facts, the statement, in the affidavit of one of the troopers, that at the time of the arrest and search "there were no federal officers present, and that we were not working in conjunction with federal officers" must be taken to mean merely that the specific arrest and search was not directly participated in by any federal officer.

We are of opinion that the admission in evidence of the liquor wrongfully seized violated rights of the defendants guaranteed by the Fourth and Fifth Amendments. The wrongful arrest, search and seizure were made solely on behalf of the United States. The evidence so secured was the foundation for the prosecution and supplied the only evidence of guilt. It is true that the troopers were not shown to have acted under the directions of the federal officials in making the arrest and seizure. But the rights guaranteed by the Fourth and Fifth Amendments may be invaded as effectively by such cooperation, as by the state officers' acting under direction of the federal officials. Compare *Silverthorne* v. *United States*, 251 U. S. 385, 392. The prosecution thereupon instituted by the federal authorities was, as conducted, in effect a ratification of the arrest, search and seizure made by the troopers on behalf of the United States. Whether the laws of the state actually imposed upon the troopers the duty of aiding the federal officials in the enforcement of the National Prohibition Act we have no occasion to enquire.

The conclusion here reached is not in conflict with any of the earlier decisions of this Court in which evidence wrongfully secured by persons other than federal officers has been held admissible in prosecutions for federal crimes. For in none of those cases did it appear that the search and seizure was made solely for the purpose

---

testimony of the United States Attorney for the Southern District of New York, Hearings before the Subcommittee of the Committee on the Judiciary, U. S. Senate, 69th Cong., 1st Sess., on S. 33, S. 34, S. 291, S. 592, S. 3118, S. J. Res. 34, S. J. Res. 81, S. J. Res. 85, S. 1823, S. 3411, and S. 3891, pp. 96, 99, 103, 107.

of aiding the United States in the enforcement of its laws. In *Weeks* v. *United States*, 232 U. S. 383, the papers not ordered returned had been obtained by a policeman who searched the defendant's home after his arrest by another state officer. pp. 386, 398. It was not shown there that either the arrest or the search was made solely for the purpose of aiding in the prosecution of the federal offense. A law of the State made criminal the acts with which the defendant was charged;[4] and the seizure may have been made in enforcing the state law. In *Center* v. *United States*, 267 U. S. 575 (Per Curiam), the liquor admitted in evidence had been taken by the state officials for immediate use in the state courts. Proceedings against the defendant, the car and the liquor were instituted there four months before the prosecution in the federal court was begun. In *Dodge* v. *United States*, 272 U. S. 530, a libel to forfeit a vessel which had originally been seized by a state officer, the question presented was one of jurisdiction. The Court in sustaining the jurisdiction, although the original seizure had been made by the state officer without authority, said, p. 532: "The exclusion of evidence obtained by an unlawful search and seizure stands on a different ground." In *Burdeau* v. *McDowell*, 256 U. S. 465, the books and papers admitted had been taken by private detectives. The District Court ordered the return "solely upon the ground that the Government should not use stolen property for any purpose after demand made for its return." p. 472. This Court based its reversal on the finding that "the record clearly shows that no official of the Federal Government had anything to do with the wrongful seizure of the petitioner's property, or any knowledge thereof until several months after the property had been taken from him and was in the possession of the Cities Service Company." p. 475.

There have been many instances in which the lower federal courts have admitted evidence obtained by state officers through wrongful search and seizure, but only three reported cases have been found in which it could have been seriously contended, in view of the law of the State and the facts appearing in the opinion, that the search and seizure had been made solely for the purpose of aiding in the enforcement of the federal law. *Schroeder* v. *United States*, 7 F. (2d) 60; *Greenberg* v. *United States*, 7 F. (2d) 65; *Katz* v. *United States*, 7 F. (2d) 67. These cases, like the present

[4]Missouri Revised Statutes, 1909, §§ 4770, 4771.

one, were decisions of the Court of Appeals for the Second Circuit, and involved searches and seizures made by officers of New York subsequent to the repeal of the Mullan-Gage law.* An examination of the record in the *Schroeder* case discloses that the sergeant of police who made the search and seizure was not acting solely to enforce the National Prohibition Act. He was a confidential investigator, charged with the task of detecting corruption and other derelictions of duty on the part of police officers; the defendant was likewise a police officer; and the sergeant, on making the search and seizure, informed the defendant that he was acting in pursuance of his regular duties. These facts were relied upon by the Government in both the trial and the appellate court. In the *Greenberg* and *Katz* cases the situation was wholly different. The Court of Appeals, failing to note the difference, treated its decision in the *Schroeder* case as controlling, and did not give adequate consideration to the peculiar relation borne in New York, then as now, by state officers to federal prohibition enforcement, although the point was made by the defendant and a decision thereon was urgently sought by the United States Attorney.

The record in the case at bar does not show that the relation between the state troopers and the federal agencies for prohibition enforcement was called by counsel to the attention of the court. But as the conviction of these defendants rests wholly upon evidence obtained by invasion of their constitutional rights, we are of opinion that the judgment should be reversed and the case remanded for further proceedings. Compare *Wilborg* v. *United States*, 163 U. S. 632, 658-660; *Clyatt* v. *United States*, 197 U. S. 207, 221-222.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

---

*Compare United States v. Bush, 269 Fed. 455; In re Schuster, 290 Fed. 927; United States v. Dessi, 12 F. (2d) 956; and United States v. Costanzo, 13 F. (2d) 259—in all of which the District Court for Western New York refused to permit the use of evidence obtained by state officials, on a finding that they were acting in cooperation with the federal authorities.